IMPLEMENTATION OF INDIAN GAMING REGULATORY ACT

Y 4.R 31/3:103-17/PT.2

Implementation of Indian Gaming Reg...

T HEARING

BEFORE THE

SUBCOMMITTEE ON
NATIVE AMERICAN AFFAIRS

OF THE

COMMITTEE ON
NATURAL RESOURCES
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

IMPLEMENTATION OF PUBLIC LAW 100–497, THE INDIAN GAMING REGULATORY ACT OF 1988

HEARING HELD IN WASHINGTON, DC
JUNE 7, 1993

Serial No. 103–17, Part II

Printed for the use of the Committee on Natural Resources

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CONTENTS

APPENDIX

JUNE 7, 1993

IMPLEMENTATION OF P.L. 100–497, THE INDIAN GAMING REGULATORY ACT OF 1988

MONDAY, JUNE 7, 1993

HOUSE OF REPRESENTATIVES,
COMMITTEE ON NATURAL RESOURCES,
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m. in Room 1324, Longworth House Office Building, Hon. Bill Richardson (chairman of the subcommittee) presiding.

STATEMENT OF HON. BILL RICHARDSON

Mr. RICHARDSON. The committee will come to order.

Today, we are holding the second in a series of hearings on the implementation of the Indian Gaming Regulatory Act. Today, we will discuss legal issues from the tribal perspective.

We have five attorneys to discuss the primary legal issues as viewed by the Indian tribes who are engaged in Indian gaming. Rest assured that this committee intends to hear all points of view on these issues and in future hearings, we will take testimony from persons expressing views contrary to the tribal perspective.

It should be noted that since our last hearing, Indian gaming has garnered a great deal of attention in the media both from lawsuits that have been filed and legislation that has been introduced. These events do not sway this committee from its commitment to conduct thorough oversight on Indian gaming. We will not be discussing any legislative proposals until this oversight function is completed and we have gathered sufficient information.

At the last hearing on April 2, we took testimony from Indian tribes, the Interior Department, the National Indian Gaming Commission, Members of Congress and Governors of States, and we laid the foundation for what we would be exploring in the next several hearings.

Several legal issues surfaced at the first hearing which we felt it was necessary to explore in greater detail. Today we will look at why the Act was written as it was with regard to the *Cabazon* decision; how the tribes perceive the regulatory scheme they are currently under; what taxes apply to tribal gaming operations; how tribes are responding to the 10th and 11th Amendment defenses some States are using to preclude compact negotiations; what restrictions apply to tribes seeking to acquire land for gaming; and whether the fact that States allow "any" gaming means that tribes can bring "all" games to the compact negotiating table.

There are some fundamental points about Indian affairs that I must make at the outset. Ninety-three thousand Indian people are homeless or living in substandard housing. Indian adolescents have a suicide attempt rate four times higher than other ethnic groups. Tuberculosis, diabetes, and fetal alcohol syndrome are of near epidemic proportions in Indian country. Unemployment rates continue to exceed 50 percent on reservations nationwide. These are pervasive problems which, in the age of deficit reduction, will probably never have sufficient Federal resources. Tribes nationwide are in desperate need of economic development.

The second point I want to make is with regard to Indian law. There are three fundamental pillars of this body of American law. First, Indian affairs is strictly a Federal function. The Congress has plenary power over Indian policy as it has since the days of treaties.

Second, the States have always been excluded from the Federal-tribal relationship by design. From the early history of the country it was clear that tribes and States were going to perpetually be in conflict.

Finally, tribes retain all sovereignty not expressly taken away by Congress. This was basically a real estate deal. The United States got the best piece of real property in the world and the tribes kept the right to totally control the small parcels they retained.

In 1988, the Congress altered these pillars a bit by passing the Indian Gaming Regulatory Act. The Act was based on the principles derived from the Supreme Court's ruling in the *Cabazon* case. I will summarize the complex Act by saying that the Congress divided Indian gaming in three different classes. Class I are traditional games regulated by tribes. Class II is bingo, pull-tabs and other games regulated by tribes and the National Indian Gaming Commission. Class III games are regulated pursuant to the terms of a compact between tribes and States. The details of these class III compact negotiations and the legal battles encountered therein are the primary focus of this hearing.

Although the States expressed their views in the last hearing, we did seek to have State Attorneys General at this hearing but scheduling difficulties precluded several from attending and so we have decided to hear from State A.G.s at a future date. Donald Trump also declined our invitation before the committee.

I welcome the witnesses we have before us today who will provide the committee with a legal analysis of many complex issues from the tribal perspective. I ask that the witnesses summarize their statements in five minutes. Your full written statement will be made part of the record. The record will be open for two weeks if others wish to make a submission. At this time, I would ask that the Summary of the Indian Gaming Regulatory Act be submitted for the record.

[The information follows:]

SUMMARY OF THE INDIAN GAMING REGULATORY ACT

On October 17, 1988, the President signed into law the Indian Gaming Regulatory Act, Public Law 100-497, 25 U.S.C. 2701 et seq. The Act provides a system for the regulation of gaming on Indian lands by dividing gaming into three classes, establishing the National Indian Gaming Commission to regulate Class II gaming and authorizing compacts between tribes and states for the regulation of Class III gaming.

Class I Gaming

Class I gaming includes social or traditional gaming which is played in connection with tribal ceremonies or celebrations. Class I gaming is regulated exclusively by the tribes.

Class II Gaming

Class II gaming includes bingo and, if played at the same location as bingo, pull tabs, lotto, punch boards, tip jars, and instant bingo. Class II gaming also includes card games which are authorized by state law or not explicitly prohibited by state law and played at any location in the state. The card games must be played in conformity with state law or regulations regarding hours of operation and pot limits.

A tribe may engage in Class II gaming if the state in which the tribe is located permits such gaming for any purpose by any person, organization or entity. Class II gaming is regulated by the National Indian Gaming Commission and the tribe or solely by the tribe if issued a certificate of self-regulation.

Class III Gaming

Class III gaming includes all gaming not included in Class I or Class II, such as casino-type games, gambling devices, pari-mutuel betting, etc.

Class III gaming is prohibited unless authorized by a tribal-state compact.

Class III Gaming and Tribal-State Compacts

Class III gaming is lawful when it is authorized by a tribal ordinance approved by the chairman of the Commission, is located in a state that permits such gaming (whether for charitable, commercial, or governmental purposes), and is conducted in conformance with a tribal-state compact which has been approved by the Secretary of the Interior.

The Act authorizes an Indian tribe and the state in which the tribe is located to enter a compact governing gaming activities. The compact may include provisions concerning: the application of

tribal or state criminal and civil laws directly related to gaming, the allocation of jurisdiction between the state and the tribe, state assessments to defray the costs of regulating the activity, taxation by the tribe in amounts comparable to state taxation, remedies for breach of contract, standards for the operation and maintenance of the gaming facility, and any other subjects related to the gaming activity.

The state is not authorized to impose a tax or assessment (except assessments that are agreed to) upon a tribe or person authorized by a tribe to conduct a gaming activity. The state cannot refuse to negotiate a compact based on its inability to impose a tax, fee, or other assessment.

The federal districts courts are vested with jurisdiction over: actions by Indian tribes arising from the failure of a state to negotiate with a tribe seeking to enter a compact or to negotiate in good faith, any action by a state or tribe to enjoin a Class III activity which violates the tribal-state compact.

A tribe may initiate an action for failure to negotiate in good faith against a state only after the passage of 180 days from the date the tribe requested the state to enter negotiations for a compact. If the court finds that the tribe has failed to negotiate in good faith, it shall order the state and the tribe to conclude a compact within 60 days.

If the state and the tribe fail to conclude a compact within the 60-day period, the parties are to submit a court-appointed mediator their last best offers for a compact.

The Secretary of the Interior is authorized to approve tribal-state compacts. The Secretary may disapprove a compact if it violates: the Act, any other federal law that does not relate to jurisdiction over Indian gaming, or the trust obligations of the United States to Indians. The compact takes effect once the Secretary publishes a notice in the Federal Register that the compact has been approved.

Gaming on Indian Lands after Enactment

Gaming is prohibited on land acquired by the Secretary in trust for an Indian tribe after the date of enactment of the Act unless: (1) the land is within or contiguous to the tribe's existing reservation boundaries; or (2) if an Oklahoma tribe, the lands are within the tribe's former reservation or the lands are contiguous to other land held in trust or restricted status for that tribe. This prohibition does not apply if the Secretary determines that a gaming facility would be in the best interests of the tribe and its members and would not be detrimental to the local community and the governor of the state concurs with the Secretary's determination. This prohibition also does not apply to

lands: taken in trust as part of a settlement of a land claim, comprising the initial reservation of a tribe federally acknowledged, or restored to a tribe that has been restored to federal recognition.

National Indian Gaming Commission

Composition

The Commission is composed of three full-time members with the Chairman appointed by the President and the other two members appointed by the Secretary of the Interior. Two of the three Commissioners must be members of federally recognized Indian tribes and no more than two members can be of the same political party. The Chairman of the Commission is Anthony J. Hope. The two Commissioners are Jana McKeag and Joel Frank.

Powers of Chairman

The Chairman is empowered to: (1) issue temporary closure orders; (2) levy civil fines; (3) approve tribal gaming ordinances; and (4) approve management contracts. The Chairman is also vested with such powers as the Commission may delegate.

Powers of the Commission

The Commission is vested with the following powers which cannot be delegated: (1) approve the annual budget; (2) adopt regulations for civil fines; (3) adopt an annual schedule of fees; (4) authorize Chairman to issue subpoenas; and (5) permanently close a gaming activity.

The Commission is vested with the following additional powers: (1) monitor gaming activities; (2) inspect gaming premises; (3) conduct background investigations; (4) inspect records related to gaming; (5) use the U.S. mails; (6) procure supplies; (7) enter into contracts; (8) hold hearings; (9) administer oaths, and (10) promulgate regulations.

Tribal Self-Regulation

A tribe may petition the Commission for a certificate of self-regulation if it has been engaged in a Class II activity continuously for a three-year period with at least one of the years being after the date of enactment of the Act and has otherwise complied with the Act. The Commission may issue the certificate if it is satisfied that the tribe has:

(1) conducted the gaming activity in a manner that has resulted in an honest accounting of all revenues, has a reputation for a safe and honest operation, and is generally free of evidence of criminal or dishonest activity;

(2) adopted and is implementing an adequate system for: accounting of revenues, investigation, licensing, and monitoring of employees, and investigation, enforcement, and prosecution for violations of its gaming laws; and

(3) conducted the gaming activity on a fiscally sound basis.

Management Contracts

The Chairman may approve a management contract if it provides: (1) adequate accounting procedures; (2) access by tribal officials to the gaming operations in order to verify the daily gross revenues and income; (3) a minimum guaranteed payment to the tribe that has preference over the retirement of development and construction costs; (4) a ceiling for the repayment of such costs; (5) a maximum term of 5 years or, at tribal request, 7 years; and (6) grounds and procedures for terminating the contract.

The management fee cannot exceed 30 percent of the net revenues unless the tribe requests a higher percentage. The Chairman may approve a higher percentage, not to exceed 40 percent, if a higher percentage is justified based on the capital investment and projected income.

All existing ordinances and management contracts, whether or not approved by the Secretary, must be submitted to the Chairman.

Commission Funding

The Commission is authorized to assess each game a fee which is based on a sliding fee scale from one-half of one percent to two and one-half percent on the first $1,500,000 of gross revenues and up to five percent of amounts over $1,500,000. The total amount of fees which the Commission can assess in any fiscal year is limited to $1,500,000. The Commission is authorized to request appropriations in an amount equal to the annual assessment. Section 8. Thus, the commission's annual budget cannot exceed $3,000,000 ($1,500,000 from assessments and $1,500,000 from appropriations). There is authorized to be appropriated in an amount not to exceed $2,000,000 for the first fiscal year.

Mr. RICHARDSON. I would like to recognize my good friend and colleague, the Ranking Member from Wyoming, Mr. Thomas.

STATEMENT OF HON. CRAIG THOMAS

Mr. THOMAS. Thank you, Mr. Chairman.

I am pleased that we are having this hearing. Interest in this issue continues to grow. I particularly want to recognize the representation by Susan Williams of the Shoshone Tribe from Wyoming. The questions you raise are good ones.

This is a bona fide hearing where we explore some things without having made decisions before we are here. There are questions in addition. The sovereignty issue is the one that is most often talked about, and I guess you have to take a look at the fact that the sovereignty on the one side, and States are asked to do a lot of things on the other. I don't know whether you can always continue to have it both ways.

That is a question I think we ought to ask ourselves, the question of it being a Federal issue. It is a Federal issue. What are the responsibilities and obligations of a State if gaming is involved? There are some problems that happen there, that States are required to be involved in. The question I suppose of defining the categories, whether it is clear or not that if gaming in a State, the level of gaming that is allowable in the States is at the same level on the reservation. I don't think so. Whether gaming is the solution to economic problems, I guess, is a question also to be considered.

So I think it is an interesting area and an interesting field, and I am delighted that you are here today and I look forward to the following hearing in which there will be different views presented.

Thank you, Mr. Chairman.

Mr. RICHARDSON. The gentleman from South Dakota.

STATEMENT OF HON. TIM JOHNSON

Mr. JOHNSON. Thank you Mr. Chairman. I commend you for holding this series of important hearings on a critically important issue that impacts the economic future and quality of life of a great many people Indian and non-Indian alike all across this country.

In South Dakota, Indian gaming has acquired a significant and growing presence. I share the mixed feelings or misgivings of a lot of people, Indian and non-Indian alike, about this explosive growth of this particular activity in my State. However, inasmuch as many of us wish there were some other engine for economic growth and opportunities in the Indian communities, the reality is that after a hundred-plus years, very little that has been meaningful has come along in order to help lift some of the poorest Americans, the original Native Americans out of just a terrible state of poverty, with several of the most impoverished counties in America in my home State of South Dakota.

Indian gaming has largely been a success in my State, not without some growth pains and not without some ongoing tension between the tribes and the States. That would be inevitable given the nature of the Gaming Act. Nonetheless, some progress has been made and the tribes have, by and large that have been involved in this, have secured a level of economic activity and prosperity that they have never ever had before.

This has engendered a greater sense of self-worth and dignity on the part of Native Americans working in those places of business, and as I talk to white citizens of off-reservation communities, has created a greater sense of respect for Native Americans. It is something that has to be monitored closely.

There is a great concern about influences that could occur which I think we need to monitor. This has a continued explosive growth potential and I think that there may be some changes in the Gaming Act that need to be considered. I think that your hearings will help lead the way to a consensus position on the Gaming Act so that we can avoid the pitfalls and yet at the same time honor the sovereignty and the opportunities that our tribes have with this particular industry.

I want to thank you for your leadership on this. We have a ways to go, but I am confident before the 103rd Congress is out, that we will have arrived at a position that may lead to some legislation that everybody can agree to.

Mr. RICHARDSON. The Chair notes the presence of the distinguished Chairman of this committee, and recognizes him.

STATEMENT OF HON. GEORGE MILLER

Mr. MILLER. Thank you, Mr. Chairman.

Like the other Members, I want to thank you very much for calling this series of hearings and for giving us some of your time on this matter as busy as you are. I want to thank you on behalf of the committee for dedicating your time to a very sticky problem.

This hearing and this subject is a continuation of over 200 years of tension in the Federal Government's relationship and among the Indian Nations and the States. I would just hope that as we continue discussions of this matter and deliberations before this committee, that we would fully appreciate the legal standing of the sovereignty of these Indian tribes and of these nations, and that we would recognize how that sovereignty was arrived at, and that as we search for solutions to both perceived and real problems with this Act, that we would look at it through that lens because I think that is a very, very important principle that this House and eventually the government of the United States is duty-bound to recognize.

I think if we do that, we can, in fact, address most of the concerns that have been raised during the time of this Act, both concerns currently and concerns that are speculated about, whether they, in fact, can be arrived at within that context.

So thank you very much for your time and for the subcommittee's time in looking at this problem.

Mr. RICHARDSON. I thank the Chairman.

We would like to have our first witnesses, Mr. Frank Ducheneaux, Ducheneaux, Taylor & Associates, testifying on behalf of the Minnesota Indian Gaming Association. Welcome. He is a former counsel to this committee for many years.

Paul Alexander, Alexander & Karshmer, on behalf of Sycuan Band of Mission Indians, Morongo Band of Mission Indians, and Lummi Tribe.

Mr. Alexander, welcome.

Mr. Ducheneaux, as we have asked, if you could summarize your statement in five minutes, it would be appreciated.

PANEL CONSISTING OF FRANKLIN DUCHENEAUX, ESQ., DUCHENEAUX, TAYLOR & ASSOCIATES, ON BEHALF OF THE MINNESOTA INDIAN GAMING ASSOCIATION; AND PAUL ALEXANDER, ALEXANDER & KARSHMER, ON BEHALF OF THE SYCUAN BAND OF MISSION INDIANS, MORONGO BAND OF MISSION INDIANS, AND LUMMI TRIBE

STATEMENT OF FRANKLIN DUCHENEAUX

Mr. DUCHENEAUX. I appreciate the opportunity to be here. I am pleased that your subcommittee and the committee have embarked upon these very important hearings to try to clarify the issue of Indian gaming and the implementation of IGRA.

The panels before you here today are on a mission of myth control in Indian gaming, and I would like to lay to rest the biggest myth created in this area through the atmosphere of distortion and, to some extent, lies that have occurred about Indian gaming.

Despite what Mr. Trump and his high-priced lawyers have stated in their judicial attack on Indian gaming, the Indian Gaming Regulatory Act did not, and I repeat, did not authorize Indian tribes to engage in gaming free of State regulation. To the contrary, as we know, and I think, Mr. Chairman, you and the Chairman of the full committee know, the Indian Gaming Regulatory Act very specifically limited the rights that Indian tribes had prior to that time.

These are rights and powers which are inherent in tribal governments and not derived from either the States or the United States.

In fact, Mr. Chairman, in your own State the Pueblo tribes had forms of government and were exercising sovereign powers of self-government long before the Europeans landed on this continent. The power of Indian tribes to regulate conduct of affairs on their lands, including the power to engage in or license and regulate Indian gaming, are derived from those inherent powers.

The 1987 Supreme Court decision in the *Cabazon* case was a clear recognition of the right of Indian tribes to regulate gaming on their lands free of State laws where the State permitted those activities in their own jurisdictions. The 1988 IGRA is a legislative litany of the destruction of many of those rights.

The Indian tribes at that time opposed the enactment of the law and reluctantly accepted it as part of an overall compromise which the enemies of Indian tribes, who pushed so hard for the compromise, now want to abandon.

So I would repeat, Mr. Chairman, the Act was an instrument of the destruction of tribal rights and not a law conferring rights.

Now I would like to turn to another myth of Indian gaming, and that is the myth surrounding the issue of taxation. This myth, which is blindly repeated by the press, is that Indians and Indian tribes do not pay taxes on revenue derived from gaming and, therefore, have an unfair economic advantage over poor Mr. Trump and the other gambling barons of Nevada and New Jersey. This is either false or a distortion of facts, and I would briefly respond in three fashions.

First, just as Indian people have assumed their responsibility to fight in this nation's wars at levels far exceeding their relative populations, the individual Indians also share in the obligations to pay Federal income taxes. Indians pay all the Federal taxes non-Indians pay except in one small area: They do not pay taxes on income which they directly derive from property which is held in trust for them by the United States. This exception has very little relevance in the area of Indian gaming, and, therefore, very little relevance in terms of the charges that are made in that area.

It is true that because of the sovereign status of the tribes and because of Federal laws interpreting that status, that individual Indians living and working on Indian reservations are not liable for payment of most State or local governmental taxes. But it is equally true but most often not reported that few of the State and local government programs funded by those taxes are ever made available to Indians on the reservations.

Second, Mr. Chairman, Indian gaming has, in fact, generated new tax revenues for the Federal Government and for State and local governments. In generating employment opportunities for Indians, Indian gaming has had a double impact on taxation. It is taking these Indians and their families off the welfare rolls, easing that burden on non-Indian taxpayers.

It has also given these Indian families an income for the first time, which I have noted is subject to Federal taxes, and even in some cases to State taxes. But it has done more than that, Mr. Chairman. It has created a general overall economic improvement on the reservations and in the surrounding communities. Indian gaming is a tax plus for almost all involved and affected.

Finally, we must address and lay to rest the argument that Indian tribes do not pay taxes. Mr. Trump and his allies attack the Indian gaming on the grounds that Indian tribes which derive revenues from gaming activities do not pay Federal, State and local taxes, and, therefore, this is unfair to New Jersey and Nevada gambling palaces.

The enemies of Indian tribes, capitalizing on the general lack of knowledge among the American public about the status of Indian tribes, attempt to equate tribes and their gaming enterprises with the commercial for-profit cash cows of Mr. Trump and his fellow barons of gaming. This constitutes economic racism in the minds of Indian people.

Indian tribes, as the Chairman has indicated in his opening statement, are governments with governmental responsibilities to their citizens. After the theft of their most valuable lands and resources and after decades of benign and in some cases not so benign neglect, they almost uniformly lack a tax base to support their governmental needs. They have had to rely upon the inadequate largesse of Federal appropriations to carry out their operations and programs.

A minority of tribes have found in gaming a means to provide not only jobs and economic activity on their reservation, but a source of badly needed governmental revenue, a substitute for an adequate tax base. Indian tribes are governments and do not and should not have to pay taxes on their governmental revenues to any other government.

In fact, the IRS made a finding in the 1960s that Indian tribes, as governments, are not taxable entities. And why should they be?

Does the State of New Jersey pay Federal tax on the revenue it derives from its State lottery? Do the majority of the other States that operate State lotteries or other State gaming enterprises pay taxes on their revenues? Of course not, nor should they.

Does Alaska and the other oil States pay Federal taxes on their share of the lease revenues from Federal oil leases? Of course not.

Do State, county or municipal governments which operate government-owned liquor stores or other commercial enterprises pay taxes to each other and to the Federal Government on their net receipts from these commercial activities? Of course not.

Indian tribes are governments. It is racist to say that they should have to pay taxes on their revenues while other sovereign or government entities do not have to do so. This charge against Indian tribes is specious and racist.

Finally, Mr. Chairman, while I realize you are going to be having hearings later on the issue of organized crime and law enforcement in gaming, I would like to make a specific comment in that area. This charge has been raised continually from the very beginning of the Congress attention to the issue of Indian gaming; that organized crime was or would be rampant in Indian gaming.

Members of the Congress, the press and others making those charges are either ignorant of or have ignored the statement of the Department of Justice on this point. I would like to read the statement made by the Justice Department in 1992 before the Senate Indian Committee.

This is Mr. Paul Maloney with the Justice Department—"But I wish to reiterate and emphasize what I stated earlier. The perception in the media and elsewhere that Indian gaming operations are rife with serious criminality does not stand up under close examination. Insofar as organized crime is concerned, the Department of Justice believes that to date there has not been a widespread or successful effort by organized crime to infiltrate Indian gaming operations. Further, there has also been little evidence of criminal activity committed by criminal elements not associated with major organized crime families."

Why has the press and other media ignored this statement? Why does the State and local opponents of Indian gaming continue to repeat the charge? Why do the anti-Indian gambling barons of New Jersey and Nevada, hotbeds of organized crime, make this charge against Indian gaming?

The tribal leader that I work with answered those questions very succinctly when she said, "Opponents of Indian gaming aren't afraid of organized crime on Indian reservations. They are afraid of organized Indians."

Mr. Chairman, that concludes my statement. I will be available for any questions.

[Prepared statement of Mr. Ducheneaux follows:]

TESTIMONY OF FRANKLIN DUCHENEAUX
DUCHENEAUX, TAYLOR & ASSOCIATES
BEFORE THE
SUBCOMMITTEE ON NATIVE AMERICAN
COMMITTEE ON NATURAL RESOURCES
U. S. HOUSE OF REPRESENTATIVES

June 7, 1993

Mr. Chairman, I appreciate this opportunity to appear before you to present testimony on the Indian Gaming Regulatory Act and on Indian gaming generally. For the record, Mr. Chairman, my name is Franklin Ducheneaux. I am currently President of my own consulting firm, Ducheneaux, Taylor & Associates, but I was formerly Counsel on Indian Affairs to this Committee from 1973 until 1990.

In 1983, under the direction of former Chairman Morris K. Udall, I drafted the first bill introduced on the subject of Indian gaming. From 1983 until the enactment into law of S. 555 as the Indian Gaming Regulatory Act (IGRA) in 1988, I was actively involved in the legislative negotiations leading up to that law. As you will recall, Mr. Chairman, those negotiations were complex, controversial and sensitive.

I am pleased that this subcommittee has embarked upon a deliberate course of oversight hearings on the implementation of IGRA. The field of Indian gaming has been plagued by misperceptions, distortions and outright lies which many of us in the Indian community believe border on economic racism. I am very hopeful that your series of hearings will lay to rest these distortions and lies, and clear up the misperceptions that they have created in the minds of some members of Congress. The panel before you is here on a mission of myth-control in Indian gaming.

Let me first lay to rest one of the biggest myths created by this atmosphere of distortion and lies. Despite what Donald Trump and his high-priced lawyer state in their judicial attack on Indian people, IGRA did not - I repeat, Mr. Chairman - **DID NOT** authorize Indian tribes to engage in gaming free of State regulations.

To the contrary, the enactment of the IGRA was a lesson in the exercise of the raw political and economic power of the non-Indian gaming industry to destroy the sovereign, governmental rights of Indian tribes. The concept that is missed or ignored is that Indian tribes are governments with sovereign powers of self-government. These powers are inherent and not derived from the States or the United States. In your own State of New Mexico, Mr. Chairman, the Pueblo tribes had forms of government and were exercising sovereign powers of self-government long before the Europeans landed on the shores of this continent.

The power of Indian tribes to regulate conduct and affairs on their lands, including the power to engage in or license and regulate gaming, are derived from those inherent powers. The 1987

Supreme Court decision in the *Cabazon* case was a clear recognition of the rights of Indian tribes to regulate gaming on their lands free of State laws where the State permitted those activities in their own jurisdictions.

The 1988 IGRA is a legislative litany of the destruction of many of those rights. The Indian tribes opposed enactment of IGRA and reluctantly accepted it as a part of an overall compromise which the enemies of Indian tribes, who pushed so hard for the compromise, now want to abandon.

I repeat, Mr. Chairman, IGRA was an instrument of destruction of tribal rights, not a law conferring rights.

Now, Mr. Chairman, I would like to turn to the myth of Indian immunity from taxation. This is another myth growing out of the atmosphere of misperceptions, distortions and lies about Indian gaming. The myth, repeated blindly by the press, is that Indians and Indian tribes don't pay taxes on revenues derived from gaming and, therefore, have an unfair economic advantage over poor Mr. Trump and the other gambling barons of Nevada and New Jersey. This is either false, or a gross distortion of fact. I will briefly respond in three ways.

First, Mr. Chairman, just as they have assumed their responsibility to fight in this Nation's wars in numbers far beyond their relative population levels, individual Indians also share in the obligation to pay Federal income taxes. Indians pay all the Federal taxes non-Indians pay except in one small area. They do not pay taxes on income which they directly derive from property which is held in trust for them by the United States. This exception has no relevance in the area of Indian gaming.

It is true that, because of the sovereign status of tribes and because of Federal laws interpreting that status, individual Indians living and working on Indian lands are not liable for the payment of most state or local governmental taxes. But it is equally true, but most often not reported, that few of the State and local government programs funded by those taxes are made available to Indians on the reservations. In those cases where the State or local governments do have a presence on the reservations, it is often not for the benefit of, or welcomed by, the Indians.

Second, Mr. Chairman, Indian gaming has, in fact, generated new tax revenues for the Federal government, and for State and local governments. In generating employment opportunities for Indians, Indian gaming has had a double impact on taxation. It has taken these Indians and their families off of the welfare rolls, easing that burden on the non-Indian taxpayers. It has also given these Indian families an income for the first time which, as I have noted, is subject to Federal taxes and even, in some cases, to State taxes.

But it has done more than that, Mr. Chairman. It has created jobs for non-Indian, on and off the reservations. These people clearly pay both Federal and State income taxes. It has sparked the non-Indian economies in both the local areas and in the State as a whole. New sales, excise and property taxes are generated. Indian gaming has drawn customers from outside the State in question and even, in some cases, from outside the country which is a fresh addition to the economy of that state and the local areas. Indian gaming is a tax-plus for almost all involved and affected.

Finally and most importantly, Mr. Chairman, we must address and lay to rest the argument that Indian tribes do not pay taxes. Mr. Trump and his allies attack Indian gaming on the grounds that Indian tribes which derive revenues from gaming activities do not pay Federal, State and local taxes and, therefore, this is unfair to the New Jersey and Nevada gambling palaces.

The enemies of Indian tribes, capitalizing on the general lack of knowledge among the American public about the status of Indian tribes, attempt to equate tribes and their gaming enterprises with the commercial, for-profit cash-cows of Mr. Trumps and his fellow barons of gambling. This constitutes economic racism in the minds of Indian people.

Indian tribes are governments with governmental responsibilities to their citizens. After the theft of their most valuable lands and resources and after decades of benign and, sometimes, not-so-benign neglect, they almost uniformly lack a tax base to support their governmental needs. They have had to rely upon the inadequate largess of Federal appropriations to carry out their operations and programs.

A few - a minority - of tribes have found in gaming a means to not only provide jobs and economic activity on their reservations, but a source of badly needed governmental revenue, a substitute for a tax base. Indian tribes are governments and do not and should not have to pay taxes on their governmental revenues to any other government. In fact, the IRS made a finding in the 1960's that Indian tribes, as governments, are not taxable entities.

And why should they be? Does the State of New Jersey pay Federal income taxes on the revenue it derives from its state lottery? Do the majority of other states that operate state lotteries or other state gaming enterprises pay taxes on their revenues? Of course not, nor should they.

Does Alaska and the other oil states pay Federal taxes on their share of lease revenues from Federal oil leases? Of course not.

Do State, county, or municipal governments which operate government-owned liquor stores or other commercial enterprises pay taxes to each other and to the Federal government on their net

receipts from these commercial activities? Of course not.

Indian tribes are governments. It is racist to say that they should have to pay taxes on their revenues while other sovereign or government entities do not have to do so. This charge against Indian tribes is specious and racist.

Finally, Mr. Chairman, I can not let this opportunity go by without making a comment on organized crime in Indian gaming. I know that you will be holding other hearings where this subject will be more fully explored, but recent comments by members of Congress sponsoring legislation to further restrict Indian rights have repeated charges of the infiltration of organized crime into Indian gaming. These members, the press, and other making those charges are either ignorant of, or have ignored, the statement of the Department of Justice on this point.

Therefore, I would like to read into this record key statements made by Paul Maloney, Senior Counsel in the Justice Department before the Senate Committee on Indian Affairs on March 18, 1992. Mr. Maloney said,--

> **"But I wish to reiterate and emphasize what I stated earlier: The perception in the media and elsewhere that Indian gaming operations are rife with serious criminality does not stand up under close examination. . . . Insofar as organized crime is concerned, the Department of Justice believes that to date there has not been a widespread or successful effort by organized crime to infiltrate Indian gaming operations. . . . Further, there has also been little evidence of criminal activity committed by criminal elements not associated with major organized crime families.".**

Why has the press and other media ignored this statement? Why do the State and local opponents of Indian gaming continue to repeat the charge? Why do the anti-Indian gambling barons of New Jersey and Nevada, hotbeds of organized crime, make this charge against Indian gaming?

A tribal leader that I work with answered those questions very succinctly when she said,--

> **"Opponents of Indian gaming aren't afraid of organized crime on Indian reservations. They're afraid of organized Indians.".**

Mr. Chairman, that concludes my statement. I want to thank you again for this opportunity and am available for any questions the Subcommittee may have.

Mr. RICHARDSON. Thank you.
Mr. Alexander.

STATEMENT OF PAUL ALEXANDER

Mr. ALEXANDER. Thank you for the opportunity to testify this morning on this oversight hearing on the Indian Gaming Regulatory Act.

As you are aware, Indian gaming is the single most successful economic development in Indian country of this century. Clearly we are not claiming that it is a panacea. Indian gaming, where market conditions permit, has enabled tribal governments to begin the transition from Third World dependent, depressed economies to economic health.

Our submitted testimony traces the legal status of Indian gaming from pre-*Cabazon* through the Gaming Regulatory Act and touches upon some of the current legal issues. My assignment this morning, however, is to deal with two additional myths.

The first myth is that Indian gaming is commercial gaming. That is totally inaccurate. Indian gaming is governmental gaming. The key difference is that Indian tribes, like the State of Maryland or the State of California, derive revenues for gaming which is dedicated to public purposes. Commercial gaming derives income if they are lucky from gambling, which is dedicated to private purposes.

The difference is codified in the Indian Gaming Regulatory Act in Section 2710, and I will paraphrase, where net revenues may not be used for purposes other than to fund tribal government, to provide for the general welfare of the tribe and its members, to promote tribal economic development and to provide funds to charitable or local government operations.

I think it is clear that the statement of the Congress is that Indian gaming is governmental gaming, not private, not commercial gaming, and that analogies that derive from commercial gaming generally have no place.

The second myth I would like to address is that Indian gaming is unregulated. In fact, I think Indian gaming is fairly heavily regulated. Just going to the pre-IGRA statute, the primary on-site regulator is the sovereign self-governing Indian tribe. That system is developed through ordinances, courts, tribal governments, in many cases, local Indian gaming commissions, through law enforcement, through security systems, surveillance operations, money count and a very sophisticated operation.

In your prior hearing, our clients, the Sycuan Tribe, testified that they expend approximately $1 million a year on the security system for their class II casino. In addition to the tribal operation in providing and regulation and enforcement, pre-*Cabazon,* the Department of the Interior provided the Section 81 or contract review function and provided the function of land review and approval of land leases.

The Section 81 statutory review also had a BIA system of regulatory guideline points which was eventually, with modification, adopted by Congress in the Gaming Regulatory Act. There is also an extensive Federal system on top of the Interior system and that

involves the FBI, the U.S. attorneys and other Department of Justice officials.

In one case in California that we were involved in, we utilized the United States Marshals to seize and padlock an illegal gaming operation that violated a tribal ordinance. This is pre-Indian Gaming Regulatory Act. The BIA has highly trained special officers who the Supreme Court of the United States and *Cabazon* refer to as an important Federal presence in Indian gaming.

Finally, access to Federal courts to enforce the contracts, the management agreements and tribal ordinances. Pre-Indian Gaming Regulatory Act, there were numerous cases that show that tribal authority to enforce its ordinances against management contractors and other employees are within their self-governing areas.

I had an associate in our firm run through Title 18 quickly to find out what Federal criminal statutes apply to Indian gaming. Our partial single spaced list covers four pages: fraud, theft of Federal funds, crossing interstate lines, on and on and on. So to say that Indian gaming even before Congress acted was unregulated was absolutely untrue.

When Congress adopted the Indian Gaming Regulatory Act, it added to this preexisting regulatory scheme Federal standards for tribal resolution and ordinances including the dedication of funds provision that I mentioned. It also added distinct standards for management contracts which generally provide that contracts can be no longer than five years, 30 percent to a management contractor, and put a cap on capital expenditures.

The statute also created the National Indian Gaming Commission and, as you know, the appointments have been very slow and it has only been operational for 90 to 120 days. But within its powers are the powers to monitor, audit, to hold public hearings, to subpoena documents, to take testimony under oath, to order temporary and permanent closures of Indian gaming, to impose fines, have access for inspection and access to records.

Moving quickly to finish, in class III gaming is where you will find the State. To the extent that a tribe in a State through a negotiated compact allows a State what it never had previously, which was access to regulation of gaming on an Indian reservation, such authority, the State will have to whatever extent it is negotiated in the compact some regulatory authority over Indian gaming.

One of the minor, if you will, fictions or myths that was created in 1988 when States approached the Senate asking for the compact revision was the myth that States had existing regulatory systems. Well, perhaps Nevada and New Jersey have extensive regulatory systems, but most States, including the State of California's regulatory systems are *de minimis* compared to the existing systems of the tribes. A tribal card game in the San Diego area is much more extensively regulated than a State-licensed card game in Los Angeles. Those are simple facts.

Thank you.

[Prepared statement of Mr. Alexander follows:]

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TESTIMONY OF PAUL ALEXANDER
BEFORE THE SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS
OF THE NATURAL RESOURCES COMMITTEE
OVERSIGHT HEARING ON THE IMPLEMENTATION OF
THE INDIAN GAMING REGULATORY ACT (IGRA)
JUNE 7, 1993

I want to thank the subcommittee for its invitation to appear this morning and testify concerning the IGRA. By way of introduction, I am a partner the above captioned law firm, located in Berkeley California, and Washington, D.C. Our firm was co-counsel in the seminal case on Indian Gaming, California v. Cabazon and Morongo Bands of Mission Indians, and we currently represent the Lummi Indian Nation in Washington State, the Iowa Tribe of Oklahoma, and the Robinson Band of Indians, the Sycuan Band of Indians, the Rincon Band of Indians, the Morongo Band of Indians, the Soboba Band of Indians, the Santa Rosa Rancheria, the Colusa Indian Community, the Tule River Tribe, and the Agua Caliente Band of Indians, of California, with respect to gaming matters. Prior to entering private practice in 1985, I was the Staff Director of the Senate Indian Affairs Committee.

As you may be aware, there is great deal of misinformation, and mischaracterization of the law and facts surrounding Indian gaming and the implementation of the IGRA. One fundamental analytical and legal misconception is that Indian gaming is commercial gaming, and as such should be treated like a privately owned casino in Atlantic City or Lake Tahoe. Indian gaming is **not** commercial gaming. It is governmental gaming. It is gaming that raises revenues to provide governmental services on Indian reservations. As such, it is almost identical to that gaming conducted by the states.

Indian Gaming is also very different factually from the private commercial gaming, such as that that developed in Nevada historically. Gaming in Nevada was primarily developed by criminal elements, elements that are commonly known as organized crime. The Government, the state of Nevada, had to come in after the fact and try to clean up this gambling industry. This effort was, as histories of this period in Nevada's history reflect, a very difficult process and one that required an intensive regulatory system; a system that even in the last decade still occasionally ferrets out remnants of the old cancer of criminal infiltration. Indian Reservations have no such history, and in

fact the Department of Justice has testified before you that this cancer of organized crime has not been found in Indian country gaming.

Even with this assurance from the Department of Justice, the myth of organized crime in Indian country still persists. In the current conflict over Indian gaming, an intensified effort has been mounted to persuade Congress to restrict the nature and scope of Tribal gaming. This effort in my view appears to be in large part based on economics (the Nevada/New Jersey non-Indian gambling industry does not want competition from Tribes for dollars that consumers otherwise would spend in their casinos). However, the conflict is not just about money. The conflict is also deeply rooted in the tension that always has existed under federal Indian law between Tribes and the federal government, on the one hand, and the States, on the other, over jurisdiction in Indian country. Unfortunately, historically the States have been very hostile to the concept of recognizing and dealing with Tribes as sovereign governmental entities.

It is very important to put Indian gaming in proper jurisdictional perspective. Otherwise, fictional legal arguments about States' rights might seem plausible. Most Americans are unaware that constitutionally, after much consideration, the federal government (not the States) was assigned the role and responsibility of Indian Affairs. Key in this federal responsibility has been the obligation to protect Tribes from States, who have often coveted their lands and assets, and sought to impose their power over Indian Tribes and people.

In 1832, the Supreme Court articulated the basic legal principle that in the absence of express Congressional consent, States have no jurisdiction over Indians in Indian country. Worcester v. Georgia, 31 U.S. 515 (1832).[1]

Since 1832, Worcester's absolute bar to State jurisdiction over all persons and transactions in Indian country evolved into a more complex balancing of federal, State and Tribal interests. Congress, as you are aware, has plenary power under the Constitution for Indian Affairs, and can preempt State law. In addition, there is a recognized federal interest in protecting and fostering Tribal self-government and economic development.

Today, in the absence of preemptive federal law or policy, States may be able to enforce some of their laws against non-Indians in Indian country, but States continue to lack jurisdiction over the Tribes themselves or over property held in trust for Indians or Tribes by the United States, and State jurisdiction over Indians in Indian country remains extremely limited. See, e.g., Williams v. Lee, 358 U.S. 218, 79 S.Ct. 269 (1959) (State lacks jurisdiction to adjudicate dispute arising on Reservation and involving Indian because exercise of State jurisdiction would infringe on right of Reservation Indians to

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[1] "Indian country" may sound like a quaint anachronism, but it is a term of art defined in 18 U.S.C. §1151.

make own laws and be governed by them); McClanahan v. Ariz. Tax Comm'n., 411 U.S. 164 (1973) (State has no inherent jurisdiction to tax Reservation income of Tribal member because federal law and policy preempts State jurisdiction over Reservation Indians); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (State taxation of non-Indian logging company preempted by federal statutes comprehensively regulating the harvest and sale of Tribal timber to maximize economic benefit of Tribal resources); Ramah Navajo School Board v. Dep't. of Revenue, 458 U.S. 832 (1982) (existence of federal policy to promote Reservation school construction preempts State taxation of non-Indian construction contractor for on-Reservation work, even though contractor not located on Reservation); Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980) (in absence of expressly preemptive federal statute or policy, State may tax on-Reservation sales of cigarettes to non-Indians, but cannot tax sales to Tribal members); Bryan v. Itasca County, 426 U.S. 373 (1976) (28 U.S.C. §1360, making State civil laws applicable in Indian country, did not extend State tax laws, grant States jurisdiction over Tribes, or authorize enforcement of State civil laws); Oklahoma Tax Com'n. v. Citizen Band Potawatomi Indian Tribe, ___ U.S. ___, 111 S.Ct. 905 (1991) (Tribal sovereign immunity precludes action against Tribe for collection of State sales tax owed by Tribe).

The Supreme Court of the United States' recent decisions uniformly require that in the absence of an expressly preemptive federal statute, jurisdictional disputes in Indian country are to be resolved by identifying and weighing the relevant Tribal, State and federal interests, and construing statutory ambiguities in favor of Tribes. See, e.g., Bryan v. Itasca County, supra. The only per se bar to State jurisdiction in the absence of an express federal statute is in the area of State taxation of Reservation Indians. California v. Cabazon, supra.

One of the critical and often misunderstood federal statutes, that provides limited jurisdiction to States is generally referred to in Indian country as "P.L. 280" (P.L. 83-280, 18 U.S.C. §1162, 28 U.S.C. §1360). Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975); Bryan v. Itasca County, supra. With certain exceptions,[2] 18 U.S.C. §1162 conferred upon enumerated States, jurisdiction to enforce state criminal laws against Indians in the affected areas of Indian country to the same extent that such laws applied to other citizens elsewhere in the state. Id. §1162 also made two federal criminal laws (Indian Assimilative Crimes Act, 18 U.S.C. §1152, and the Major Crimes Act, 18 U.S.C. 1153) inapplicable in the areas to which State law now applied.

28 U.S.C. §1360 conferred upon the courts of the enumerated

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[2] Taxation, elienation end encumbrance of trust property, land use regulations, federelly-protected hunting and fishing rights, adjudication of the ownership and right to possession of trust property. A copy of P.L. 280 is attached for your reference.

states jurisdiction to adjudicate civil causes of action arising in Indian country and involving Indians, again subject to certain exceptions. §1360 also provided that Tribal laws not inconsistent with State laws were to provide the rule of decision in such cases. P.L. 280 was not itself a termination statute; neither did confer upon the States any taxing jurisdiction or any jurisdiction over the Tribes themselves. Bryan v. Itasca County, Id.

Perhaps most importantly, 28 U.S.C. §1360 did not confer upon the States any jurisdiction to enforce State civil laws; those laws merely are to provide the rule of decision in cases arising in Indian country. Id.

As State lotteries began to proliferate in the early 1980's, several Indian Tribes in Florida and California began raising revenues by operating bingo games offering larger prizes than those allowed under State law. When the states threatened to close the operations, the Tribes sued in federal court, contending that under the distinction that the Supreme Court had made in Bryan between civil/regulatory and criminal/prohibitory laws, the state bingo laws were civil/regulatory, and thus were not within P.L. 280's' grant of enforcement jurisdiction to the States. The Fifth and Ninth Circuits agreed with the Tribes. Seminole Tribe v. Butterworth, 658 F.2d 310 (1981); Barona Group of Capitan Grande Band v. Duffy, 694 F.2d 1185 (9th Cir. 1982). In those cases, the courts classified the State law not by where the state laws were codified (in California, the bingo law is Penal Code §326.5), but by whether the law reflects a public policy to regulate rather than to prohibit the conduct.

Notwithstanding the Ninth Circuit's decision against San Diego County in Barona, the State of California and Riverside County authorities asserted jurisdiction to enforce California and County bingo and cardroom laws against the Cabazon and Morongo Bands. Both Bands filed suit against Riverside County in the U.S. District Court in Los Angeles. The district court entered judgment declaring the State and County to be without jurisdiction to enforce their bingo and cardroom laws on the Reservations, the State and County appealed, the Ninth Circuit Court of Appeals affirmed and the State petitioned the U.S. Supreme Court for a writ of certiorari.

On February 25, 1987, the Supreme Court affirmed the Ninth Circuit's decision by a 6-3 vote. In California v. Cabazon and Morongo Bands of Mission Indians, supra, the Supreme Court held that P.L. 280 had not authorized enforcement of bingo and cardroom laws on the Reservation because those laws are regulatory, rather than criminal; that application of State and County gaming laws to the Reservation was not authorized by the Organized Crime Control Act ("OCCA"); and that the State's professed interest in preventing infiltration of Tribal gaming enterprises by organized crime did not justify State regulation of such enterprises in light of compelling federal and tribal interests supporting them.

In Justice White's majority opinion, joined by Chief Justice

Rhenquist, the Court attached great weight to the federal policy of encouraging Tribal self-sufficiency and economic development, and noted that these gaming activities provide the sole source of revenues for the operation of the Tribal governments and are the major sources of Reservation employment for Tribal members. 480 U.S. at 217-218. The Court also found that the State did not contend that there was any criminal involvement at either facility, and the Ninth Circuit found none. 480 U.S. at 221.[3]

The Court articulated the following test for determining whether P.L. 280 gives a State the power to enforce a particular statute or class of statutes:

> ...if the intent of a state law is generally to prohibit certain conduct, if falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.

480 U.S. at 209.

The Court proceeded to generally review the scope of gambling either allowed or tolerated in California, and based on that review concluded,

> In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.

480 U.S. at 211.

Accordingly, the Court found that P.L. 280 had not given California jurisdiction to enforce its gambling laws on Reservations.

Congress was already considering Indian gaming legislation when the Supreme Court decided Cabazon. See H.R. 4566, 98th Cong., 2d Sess. (1984), cited at 480 U.S. at 1094, n. 24.[4] After Cabazon, the push from the states, led by Nevada, and assisted by organized commercial gaming interests, to reign in Indian gaming resulted in legislation being enacted.

The Indian Gaming Regulatory Act separated gaming into three classes, and allocated regulatory jurisdiction over each class among Tribal, federal and State sovereigns.

Class I is social games of minimal value, or traditional Indian gaming played as part of or in context with ceremonies or

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[3] In the ten years since Cabazon was filed, the States have not produced any evidence of infiltration of Tribal gaming by organized crime.

[4] Ironically, IGRA first had been proposed by Tribes as insurance against an adverse Supreme Court decision in Cabazon, and was opposed by the States. Following the Supreme Court's decision, the States, led by Nevada and its organized gambling interests, suddenly became more interested in imposing federal regulation upon Indian gaming, conjuring up the same arguments about organized crime and other imagined horrors as California and 17 State amici had raised in Cabazon, and which the Court rejected in that case.

celebrations, is subject to exclusive Tribal regulatory jurisdiction. 25 U.S.C. §§2703(6), 2710(a)(1).

Class II is bingo and similar games (including pulltabs and punchboards), whether or not electronic, computer or other technological aids are used in connection therewith, as well as non-banking[5] card games that either are expressly allowed or not expressly prohibited by State law; Class II gaming is subject to Tribal regulatory jurisdiction, with extensive oversight by the National Indian Gaming Commission (NIGC). 25 U.S.C. §2703(7), 2710(a)(2), (b). Included in Class II are (banking) card games that were in existence in specified States (Michigan, North Dakota, South Dakota, Montana, and Washington State) on or before May 1, 1988.

Class III is all other forms of gaming other than Class I or Class II gaming, specifically including slot machines of any kind, and electronic or electromechanical facsimiles of games of chance. 25 U.S.C. §2703(8); §2703(7)B(ii).

Class III gaming is lawful on Indian lands only if the gaming has been authorized by a Tribal ordinance approved by the Chairperson of the NIGC and such gaming is permitted by the State for any purpose by any person, organization, or entity, and is conducted in conformance with a Tribal-State compact entered into by the Tribe and the State that is in effect. 25 U.S.C. §2710(d)(1). The Tribal-State Compact provision was proposed by the Nevada congressional delegation on behalf of the States.

IGRA leaves allocation of jurisdiction over Class III gaming to the Tribal-State compact negotiation process (a compact must be approved by the Secretary of the Interior). A compact may, depending upon negotiation, include assessment by a State to defray its cost in providing any regulatory activity required by the compact, taxation by the Tribe of the gaming activity (not by the States), remedies for breach of contract, and standards for the operation of the gaming activity, including licensing.

Under IGRA, a Tribe must request a State to enter into compact negotiations. Once a request is made the State has a obligation to negotiate in good faith to enter into a compact. Jurisdiction is provided to the federal district court concerning: (1) any cause of action by a Tribe arising from a State's failure to conduct negotiations in good faith; (2) an action by a State or a Tribe to enjoin any Class III activity conducted in violation of a compact; and (3) any cause of action

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[5] A "banking" game is a game in which the house takes on all comers, paying all winners and collecting from all losers. Casino-style blackjack is an example of a banking card game; roulette and craps are examples of banking table games. In non-banking games, players play against each other, paying the house rent for supplying the dealer, table, cards and chips. Unbanked poker games are played in many cities in California. The State Lottery's Lotto game is an unbanked game, as is parimutuel wagering on horseraces; there is a dispute about whether the Lottery's fixed-prize games, such as Keno or scratchers, are banked or unbanked games.

A "percentage" game (purportedly prohibited by Pen. Code §330) is a game in which the house takes a fixed percentage of what is wagered or won. A banked game also may be a percentage game. The State Lottery's games are percentage games, as are parimutuel pools on horseraces.

initiated by the Secretary of the Interior to enforce the Secretary's authority under the IGRA to enforce mediation procedures.

Where a Tribe challenges a State's failure to negotiate in good faith, the State bears the burden of proof in demonstrating that it has negotiated in good faith. If a court determines that the State has not negotiated in good faith, the court may order negotiations, which may include mediation. If a State, refuses to implement a mediator's recommendation, the secretary of the Interior shall prescribe procedures for Class III gaming by the Tribe consistent with the law and the mediator's recommendation.

The National Indian Gaming Commission, created by the IGRA, has significant regulatory and investigatory authority, including fines and closures, over Class II gaming. Tribes contribute to the support of NIGC through an assessment on the gross revenues of Class II gaming. The NIGC Commissioners were not appointed in a timely fashion, and the NIGC only became operational in 1993. The NIGC also has extensive authority over management contractors dealing with Indian Tribes for both Class II and Class III gaming, including limitations on the length of contracts, the proportion of fees allowed, and the general background and character of those who may operate gaming in Indian country.

IGRA intrudes into internal Tribal affairs by specifying that Tribal ordinances authorizing Class II and Class III gaming must provide for the use of Class II and Class III gaming revenues for Tribal Governmental purposes. 25 U.S.C. SS2710(b)(2)(B), (d)(1)(a)(ii).[6]

With narrow exceptions, IGRA also prohibits gaming on lands acquired after October 18, 1988, without the concurrence of the Governor of the States in which the activity is to occur. 25 U.S.C. S2719. IGRA also assimilated into federal criminal law all State laws -- both criminal/prohibitory and civil regulatory -- pertaining to gambling, but excluded from the definition of "gambling" Class I and Class II gaming and Class III gaming conducted pursuant to an approved and effective Tribal-State compact. 18 U,S.C. S1166.[7]

Under Cabazon, the state lacked jurisdiction to enforce its gaming laws against Tribal gaming activities on Reservations.[8] IGRA's Class III compact provisions created a means by which States could enforce their gaming laws that otherwise would not be applicable to reservation gaming. This represented a major inroad into Tribal self-government that the Tribes objected to but accepted reluctantly, as the political price to be paid for

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[6] Per capita distributions of gaming revenue are subject to strict limitations. 25 U.S.C. §2710(b)(3).

[7] §23 of IGRA has been codified at 18 U.S.C. §§1166-1168.

[8] Non-P.L. 280 states had even less of a theoretical basis for asserting juriadiction over Reservation gaming.

preserving their right, recognized in Cabazon, to engage in what IGRA termed Class III gaming.

Disputes about IGRA's Class III compact provisions arose almost immediately. Several states resisted negotiating compacts on the grounds that they were obligated to negotiate only about forms of Class III gaming specifically authorized by State law, and then only to the extent authorized by State law. In Mashantucket Pequot Tribe v. State of Conn., 913 F.2d 1024 (1st Cir. 1991), cert. den. 111 S.Ct. 1620, the court held that if a State law authorizes charitable groups to conduct "casino" nights at which limited prizes can be won, the State's public policy is to regulate rather than prohibit casino gaming, and thus that the State is obligated to negotiate a Class III compact authorizing such gaming by a Tribe, without regard to State-imposed prize limits. The Tribe recently opened one of the country's largest casinos pursuant to that compact.

In Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin, 770 F.Supp. 480, app. dism., 957 F.2d 5154 (7th Cir. 1992), the court held that the repeal of the State's constitutional prohibition against gambling, and the establishment of a State lottery authorized to conduct virtually any form of gaming, established that the State's public policy was to regulate, rather than prohibit, gaming. The court also held that "permit" is not limited to affirmative authorization, but includes absence of affirmative prohibition.

In Sycuan Band of Mission Indians v. Roache, 788 F.Supp. 1498 (S.D. Calif. 1992), the Southern District of California held that California regulates, rather than prohibits, Class III gaming, that even California's laws against slot machines are not prohibitory, and that IGRA preempts whatever jurisdiction California otherwise might have to enforce its gaming laws on Reservation lands.

Having consistently lost in court on the scope-of-gaming issue, the States have begun defending against bad-faith lawsuits by attacking IGRA itself. States have asserted that the judicial remedies created by IGRA are inconsistent with State sovereign immunity under the Eleventh Amendment, and that requiring State involvement in regulating Class III gaming infringes upon rights reserved to the States and the people under the Tenth Amendment.

A number of district courts, relying on an erroneous interpretation of the Supreme Court's decision in Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), have accepted one or both of these defenses. See, e.g., Poarch Band of Creek Indians v. State of Ala., 776 F.Supp. 550 (S.D. Ala. 1991); Ponca Tribe of Oklahoma v. State of Oklahoma, No. 92-988-T, slip opinion Sept. 8, 1992; Pueblo of Sandia v. New Mexico, No. 92-0613-JC, slip opinion Nov. 13, 1992; Sault Ste. Marie Tribe of Chippewa Indians v. State, 800 F.Supp. 1484 (W.D. Mich. 1992); Spokane Tribe v. State of Washington, 790 F.Supp. 1057 (E.D. Wash. 1991). Other district courts, in better-reasoned decisions, have rejected them. See, e.g., Seminole Tribe of Florida v. State of Fla., 801 F.Supp. 655 (S.D. Fla. 1992);

Kickapoo Tribe of Indians v. State of Kansas, No. 92-4233-SAC, slip opinion March 29, 1993 (D. Kansas). On March 5, 1993, the district court for the Eastern District of California in Sacramento issued a tentative ruling rejecting California's Tenth Amendment defense.[9] No Court of Appeals has yet resolved these issues.

One of major myths that has evolved in the current political debate that seems to ignore the statute and the court interpretations is assertion that Indian gaming is unregulated. As pointed out earlier, except for that authority provided pursuant to Class III compacts, states have no authority to regulate Indian gaming. That, however, does not leave Indian gaming unregulated. In Class II Tribes and the federal government provide for an extensive panoply of regulations and enforcement agencies. Much more, in fact, than provided for similar games played by non-Indian operations. The federal government's role is provided by the National Indian Gaming Commission, the Bureau of Indian Affairs, the U.S. Attorneys (locally), and the Department of Justice, including the F.B.I. Perhaps more importantly is the extensive regulatory presence of the Tribal systems: audits, security, police, surveillance, Gaming Commissions, and the like. Even before the IGRA, tribes themselves successfully regulated certain forms of tribal gaming by exercising their inherent police powers and, when necessary taking violators. I would suspect that none of the management companies that our clients have thrown out would consider Indian gaming to be unregulated or even underregulated. (See, e.g., Morongo Band of Mission Indians v. Rose, 893 F.2d 1074 (9th Cir. 1990) and Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989). Tribes take regulation very seriously, it is their money and integrity that they are protecting. For example, one of our clients, Sycuan, the law enforcement budget alone for the class II enterprise exceeds $1,000,000 per year.

For Class III gaming the regulatory scheme, as noted, is determined by Compact negotiation and may involve state systems, as well as tribal systems. One of minor myths that has evolved about gaming is that states other than Nevada and New Jersey, have regulatory systems of any substance and depth. Usually tribal systems are more experienced and staffed than their state counter-parts. Even where states have a Gaming Commission in place, that commission's role is frequently focused on the collection of taxes and fees as opposed to oversight. Also the whole panoply of federal criminal laws that apply to crimes on Indian Reservations, inter-state conspiracies to commit crimes, the various fraud and embezzlement of tribal funds statutes, all apply to class II and Class III operations. It is therefore very

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[9] By stipulation, California waived its Eleventh Amendment defense in exchange for a limitation by the Tribes on the scope of gaming as to which a declaration was sought. The tentative ruling of the court was that California regulates, rather than prohibits, all forms of Class III gaming, and thus that California could not refuse to negotiate a compact that authorizes certain forms of electronic/video gaming devices, as well as banking and percentage games.

misleading to assume that the handful of B.I.A. employees assigned to Department's residual Class III responsibilities represent the federal commitment.

Mr. RICHARDSON. The Chair recognizes the gentleman from Wyoming for any questions.

Mr. THOMAS. Thank you, Mr. Chairman.

Thank you, gentlemen. It is really a very thorough analysis.

My questions are more general, I suppose, and really searching for information, but you mentioned several times the gambling barons and so on. But they are not the only ones. We had, I think, only one governor who testified who was happy with the situation that now exists. So how do you classify the opposition being only Donald Trump—and I am no defender of Donald Trump—but here you have all except one governor being concerned about changing the act.

Mr. DUCHENEAUX. I am glad you asked that question, Mr. Thomas. When that vote was held in the national governors meeting where you had, we understood, 49 governors voting against Indian gaming, I think subsequent contacts really disclosed that most of the governors had no idea what they were voting on.

Indian gaming is occurring to a greater or lesser extent in probably about 25 States, around half of the States in the Union. The State Governor in the State of Kentucky has no interest whatsoever in Indian gaming, and I think the statement that came out of there that Indian gaming was one of the highest priorities of the governors, has to be hyperbole or something. I can't imagine that in the Chairman's State of California that Indian gaming is one of their greatest problems.

There is no question, however, that the State officials, the governors and the States' Attorneys General and others have always been opposed to Indian gaming from the outset. Their position has been that Indian gaming on the reservation should be controlled completely by State regulation. That is nothing new, Mr. Thomas. I think State government has always been opposed to their inability to regulate any kind of conduct on Indian lands, the zoning of lands, taxation, criminal and civil jurisdiction of all kinds.

So it is very true that many State governors and State A.G.s are opposed or would like to see changes in IGRA. They would like to get another one or two bites out of the apple. Their position, however, at least in recent months, given the process on the other side, has softened. I think they are becoming more educated about Indian gaming in their own States. They are becoming aware that in many cases Indian gaming is a boon to their State.

I agree that there is some opposition. That is being worked on. But the flat unalterable, unequivocal opposition to Indian gaming is primarily based economically and is coming from New Jersey, Nevada, the horse and dog industry, and the general non-Indian gaming industry.

Mr. THOMAS. Thank you.

Mr. ALEXANDER. Just to sort of emphasize the point, even though there has been a great deal of rhetoric, there are 75 State tribal compacts representing 58 tribes in some 18 different States. Even though there has been a great deal of discussion, States and tribes have been able to at least sit down 58 separate times and come out with a deal that the State has been willing to sign on. I think that is fairly important. That is as reflected in the Federal Register.

Mr. THOMAS. Where do you think the concern comes—if the net proceeds are to go to government, as you indicate here, the concern apparently has some substance that organized crime or organized gambling or so on would benefit financially from this. Is it in the gross numbers before the net? Is it the in contracting? How does that become an issue if the money is always within the tribal government?

Mr. ALEXANDER. Well, I think there are sort of several aspects to the answer. One is that, to reflect what Frank has been saying, a lot of the conflict generates between the jurisdictional conflicts between States and tribes. Go to California, where our firm practices—tribes in the State have been in litigation for 20 years on every zoning land use issue that you can possibly think of. This litigation has not been very different than the litigation that came out with respect to gaming.

There is also a myth going around that tribes are somehow greatly vulnerable to organized crime. I won't pretend that nothing bad has ever happened in account or people haven't tried to mess around with the Indian gaming institutions. Obviously. The tribes look at that more closely than anybody else does.

But the FBI has testified that it just isn't there and there is a really critical difference between Indian tribes and the State of Nevada. Nevada's industry started and was run by primarily organized crime for a long, long time. And then the State in a very extensive effort had to come on top of that system with a double regulatory system. They had both a board and a commission to try to stamp out that cancer of organized crime. They have been sort of fighting that same battle now for 30 years.

Indian reservations do not start as a place of organized crime. People know who they are.

Mr. THOMAS. I am not really referring to organized crime as much as I am the financial aspects of operating sophisticated casinos. Isn't that going to be contracted out to other than tribal people for the most part?

Mr. ALEXANDER. In Sycuan, the security system is run by the tribe.

Mr. THOMAS. I am talking about operating the function, not about security.

Mr. DUCHENEAUX. I think what you are getting at is the management contract from the outside that the tribe brings in. The history of the committee shows the Congress was very concerned about that also, and because at the time that Indians first began to get involved in gaming of this size they were, A, completely devoid of capital to act to fund their own operations; and B, not having their own internal capabilities for management.

So most of them at that time, and this was in the early 1980s, did seek out and were sought out by financiers, by management people and in many cases were taken advantage of. In some cases, the management companies that were involved at that time had very shady operations and very shady characters involved. There was strong concern about that.

You will find that in most cases now where Indian tribes have gaming of any sophistication they run it themselves. Obviously they hire a manager. In some cases the manager is an Indian and

in many cases a non-Indian, but in most cases the manager is an employee of the tribe. There are managers who are outside contractors, outside financiers. The Act requires that these outside contracts be fully investigated and the people involved——

Mr. THOMAS. So you won't be concerned that a management group would go away with the dough and tribes would end up——

Mr. DUCHENEAUX. Absolutely we would be concerned.

Mr. JOHNSON. Is there a conflict between the BIA and the gaming commission relative to overlapping authority that you think needs resolution legislatively Mr. Alexander, or do you see no conflict between these two oversight agencies?

Mr. ALEXANDER. For a while as the commission was getting underway and you had the BIA in a transition phase, it was somewhat difficult to figure out where to get an ordinance approved or who would be approving the contract. The commission is now supposedly fully operational. The BIA authority is fairly residual.

I think we will need more experience seeing how the gaming commission operates to see whether or not there are any gaps between the BIA and the gaming commission. I don't see any statutorily, but functionally we just don't have the track record.

We are really only talking about from February of this year that you have a field operation and a full set of regulations at the gaming commission. So even though it is a five-year-old Act, there isn't a track record.

Mr. JOHNSON. At this point, in any event you are not concerned about any conflict which would impede development of the Indian gaming?

Mr. ALEXANDER. No.

Mr. JOHNSON. Mr. Ducheneaux, the Indian Gaming Act prohibits gaming on land acquired by the Secretary after date of enactment of the Act with a couple of exceptions. For the most part, it is prohibited unless both the Secretary of the Interior and the governor authorize the siting of a gaming facility outside the original land base. This has been a cause of some controversy in my State.

Obviously, some of the poorest and largest of our tribes are also the most isolated of the tribes, and don't have some of the gaming opportunities that frankly some smaller and more urban or at least closer to urban-located tribes have. On the other hand, understandably there is concern on the part of the non-Indian community about the location of gaming sites or casinos virtually anywhere in the State.

In your view, is this just a matter of tension and negotiation that is inevitable and will have to continue on? Do you think the governor should have no right to limit gaming anywhere within the boundary of the States as long as the Secretary approves? Is there a resolution to this conflict, or is this just something that is inevitable, that we will have to live with?

Mr. DUCHENEAUX. I am glad you raised the question, because I will answer a question you didn't ask first. This whole issue of Indian tribes securing lands off their reservation to establish gaming industries has been blown out of proportion. There have been some notorious proposals which rang alarm bells, Detroit and Council Bluffs and Chicago. From these unsuccessful proposals has come the charge by some people that there are going to be wall-to-wall

Indian casinos across the country. This is flat ridiculous and it is a scare tactic.

No question that the issue was one of real concern to the Congress during consideration of the legislation. I recall Congressman Bereuter of Nebraska was the first one to introduce a bill addressing that issue, and his concern arose out of a proposal where this might have been occurred. That bill became incorporated in a modified fashion into the Indian Gaming Regulatory Act in Section 20 where the Act prohibits gaming on lands acquired after date of the Act off the reservation. An exception is made because there was a feeling at that time among some non-Indian officials that where there was political support from the governor or others in the State for that, that it ought to be able to occur.

So Section 20 provides—also, there was a general existing right of the Secretary to take lands in trust for tribes for various purposes off the reservation. In attempting to balance the two interests, Section 20 provided that the Secretary could take lands in trust despite the prohibition where he made a two-part determination, A, that taking the land in trust for gaming off the reservation would be in the best interest of the tribe; and B, that it would not be detrimental to the surrounding community. It says the governor would have to concur in the second determination.

When that section was first being considered, the Justice Department had concerns that the language violated the appointments clause of the Constitution, which at that time they said if the governor was given some veto over the act of a Federal officer, in this case the Secretary, in carrying out a Federal statutory power, that this would be a violation not only of the separation of powers but also the appointments clause of the Constitution.

Some modification was made to the language, resulting in the governors' concurrence authority. There is a real question whether that concurrence is a veto authority or simply an authority where the governor would have to come in and show to the satisfaction of the Secretary that the Secretary's determination that this would be detrimental to the surrounding non-Indian community was not detrimental, was wrong.

There is some power on the part of the States acting through the governor to have a very clear role in any proposal and at least as far as the last administration was concerned acting through Secretary Lujan, that where the governor did not concur, he could not go forward.

Mr. JOHNSON. Has the ability of the governor to oversee and to approve or disapprove the siting of a casino, has that been litigated at this point?

Mr. DUCHENEAUX. There is only as far as I know one case of litigation involving the Siletz Tribe. Section 20 also says that the prohibition does not occur in those cases of a restored tribe. That is because the terminated tribe had its reservation wiped out completely by termination and when it was restored, they needed to have some lands restored to them as a reservation for economic and other purposes. That tribe is such a terminated-restored tribe. That is the only case in current litigation involving Section 20. The Siletz case is at a briefing stage at district court level.

Mr. JOHNSON. Do you see a better mechanism for balancing the interests of the States versus the tribal interest in locating a casino, or is this something you can live with?

Mr. DUCHENEAUX. I should be candid and say Siletz is one of my clients. I hope they win the litigation.

I think it is an adequate provision. The governor has clear involvement. The section requires consultation with local people, local non-Indian governments and people and the governor, by the Secretary on this and in certain cases requires an EIS finding because it involves a Federal action. I think there are for the moment adequate protections.

Mr. JOHNSON. I yield back.

Mr. RICHARDSON. Chairman Miller.

Mr. MILLER. Thank you, Mr. Chairman.

Let me thank you both for your testimony. It has been very helpful. It is very hard to defend an Act when it is constantly barraged by allegations that simply do not bear scrutiny when matched against the facts, and I think that your testimony has been very helpful here.

The constant allegations, long before even the Act was drafted, the hearings we had in San Diego many years ago, the constant allegations that the criminal elements sprung forth from within the tribes over and over again, that this was the basis for desiring Indian gaming by tribes, just has consistently been knocked down. Again, not to suggest that criminal elements and unsavory characters haven't sought an opportunity, but, in fact, in most of those cases the tribes have blown the whistle themselves and sought help from law enforcement agencies.

The suggestion that management contracts somehow are unsavory when, in fact, one of the tests of wisdom is to know what you don't know, just a small investors' contract with mutual funds or money managers or bank trust departments to manage their estates, their funds and their income, Indian tribes ought to know that perhaps they don't know about Indian gaming but there are people who know one heck of a lot about Indian gaming.

It is interesting that many of the people who early on were making great allegations about criminal activity in management contracts now are seeking management contracts with Indian tribes all over the nation because they understand this is about real economic opportunity in more ways than one, not just for the tribe but also for people who properly manage it.

I find it rather interesting when I visit in discussions with one of the management contracts, they are essentially engaged in a management contract that will put them out of business because of the training that they are engaged in during the life of that contract so that the nation can in fact take over the comprehensive management, hopefully, of that operation. So I think that again we see stones thrown at the tribal sovereignty of this program, but that is no different than we have seen.

And, Mr. Alexander, you have pointed it out in your testimony, time and again we have seen these forays against Indian sovereignty in law enforcement, in timber receipts, in mining receipts, in minerals, in contracts, time and again, time and again, historically, throughout the history of this country, and this is, as I said

in my opening statement, a continuation of that tension. The stakes are now very big. This is no longer about a small local item; this is about hundreds of millions of dollars and billions of dollars that potentially will go through Indian gaming, and all of a sudden we find an interest in it unmatched before.

But I think, Frank, as you pointed out in your testimony—both of you, as a matter of fact, point out in your testimony—that the compact wasn't something thrust upon the States. In fact, the States and the delegations most interested in this brought that forth, if I remember, those negotiations.

Isn't that quite correct, when we were in the final stages of negotiations, Frank, that the contract was brought forth by the interest of the States?

Mr. DUCHENEAUX. That is generally correct, Mr. Chairman. As you will remember back then, when the legislation was being considered in the Senate, the States insisted upon a regulatory role on Indian gaming, and of course as they had none at that time. The tribes very strongly opposed that, and the Senate in attempting to—and the Congress as a whole, in attempting to strike a balance there, agreed to a compacting procedure that the States proposed to give them some role in regulation, and it was to be a negotiation kind of thing, and there will be other members of the panel who will clarify that, but you are very correct. The compacting procedure was not asked for by the tribes.

As a matter of fact, IGRA as a whole was not asked for, but specifically the whole compacting thing was not something asked for and pushed for by the tribes, but it was an attempt to accommodate the States. The States agreed to it, and now they want to run away from this.

Mr. MILLER. Where else have we done this, had these kind of compacts?

Mr. DUCHENEAUX. I can't think of anything off hand, Mr. Chairman, that springs to mind. Maybe in the area of—no, I don't know of any.

Mr. MILLER. I think one of the concerns that I think you properly characterized the position of the governors is that it is changing in the ongoing discussions that have taken place, and not to suggest that they are not concerned because they are, but I think one of the concerns, and I don't know if you can address this, that is that I think the governors' concern would be that they do not get themselves into a position where the Indian nations are driving the issue of Indian gaming.

The theory I think at one point in the discussions of the law were that when the State opens the door, the Indian Nations are entitled to walk through that on a parallel system, so to speak. The concern I think that we have heard from time and again is that in some instances that the governors feel a sense of loss of control about that issue.

Can you address that or do you feel competent to address it at this time?

Mr. DUCHENEAUX. Yes, Mr. Chairman.

Mr. MILLER. Let me just add on to that because I think most of the very particular objections that have been addressed are, in fact, already addressed by the law as we saw with this after—acquired

lands and the role of the governors, a number of governors had no realization that in fact they had a role to participate. But go ahead.

Mr. DUCHENEAUX. I agree with you, Mr. Chairman. I think this is a real concern on the part of the States, and in trying to look at it as objectively as I can, being an Indian and also representing Indian tribes that are involved in this, and maybe I shouldn't, I will lose my clients, but in trying to look at it as objectively as we can, I think we can understand the concerns of States in this area about losing control. Many of them are not comfortable at the outset with the fact, the legal fact, that there are government entities within their boundaries which for decades at least, they have not had the kind of control that they would like to have had. You mentioned that in your opening comments. The gaming thing is something which exacerbated their feeling about that.

I think those issues were attempted to be addressed, and I think were more or less adequately addressed in IGRA where in that area where they felt the strongest, and you will remember in what finally came to be called class III, in that area where they felt the strongest about this, they were given a role to play in the compact procedure, and there again other members of the panel may talk about this, but they were given that role to play, and again, in attempting to balance that new conferring of power on the States to gain this control that they felt they needed, it was recognized that this created another imbalance, that if Congress did nothing more, then States could just simply refuse to compact and walk away from it.

That is where this whole Federal suit by the tribes and the good-faith standard again which others will talk about came into play, but the fact of the matter is that those States—the States have never allowed that issue to go to court to go to final judgment on the merits, but I know there is that concern there, and as State officials begin to work with their tribes, with the tribes in their State on compacts, as Paul mentioned in Minnesota and others, compacts have been worked out, and they are operating very well.

The States have the kind of control they feel they need through the regulation they negotiated, yet the States have maintained a proper and appropriate sovereign role with conduct on their reservation.

Mr. ALEXANDER. I grant that the governors and other State officials continually express a concern about this issue, and I believe the Act addresses it. But there is another aspect to it, and in sort of a way it is sort of the tail wagging the dog here. In the last 20 years State laws have changed significantly.

We provided to your staff a listing of the 49 States that legalized gaming, and States have expanded their laws left and right over the last two decades, and State laws provide for extensive gaming now, and Indian tribes provide basically somewhere between two and five percent of the gaming revenues received, between two and five percent of the gaming revenues nationwide, yet the focus seems to be on the Indian tribes that are leading this sort of explosion in gambling, and it is not factually accurate.

Mr. MILLER. I understand that. I think there is a problem here of the old doctrine of clean hands. You come to this case, and you

suggest you don't want gaming but what you find out is you really don't want Indian gaming inside of the State boundaries.

I just came back from Montana last night, and had an opportunity to spend a couple hours in a bar waiting for a plane, and the only difference between what was going on in that bar and what is going on in casinos in Las Vegas is the coins don't drop out of the bottom. You get credits. For the life of me I couldn't—I don't know why anybody would play against the computer when the computer knows what you need to win before you put the coin in, but people are welcome to do what they want, but——

Mr. ALEXANDER. That is what the statute——

Mr. MILLER. I understand that, but in the same token, we believe also in a policy of good neighbors between nations, we ask that the nation of Mexico not pollute the San Diego harbor, we ask that the nation of Canada not destroy the watersheds upstream from streams into north—I think that tension has got to be recognized by Indian tribes that that is real.

I don't think people believe that slot machines are legal in the State of California, and I think that if the end result is that the Indian tribes end up driving the legalization of slot machines in California, that is going to turn out to be a very substantial problem, very substantial problem. And recognizing that the State keeps expanding the boundaries, the electronic keno games in a bar start to look a lot like bingo that looks more like slot machines.

These are very difficult issues, given the technology, and so governors are going to have to decide in their quest for revenues, just as the Indian nations have a quest for revenues, you know, it is hard to be a little bit pregnant in this fight, and so governors they are winking and nodding they only want three casinos in certain towns, but all of a sudden they have got to deal with Indian gaming. They are not suggesting they are going to close down the three casinos, they just don't want Indian gaming.

That is what this committee, I think, and unfortunately the Chairman is going to have to sort out. To me, that is more of the real tension than it is the specifics of the law.

Mr. ALEXANDER. But I think the two are related because you put your finger on it. In California the accusation is that the tribes are going to bring slot machines into the State. Well, the California lottery, as you note, provides a lot of technological aids to be able to operate, and they look an awful lot like what the State says it doesn't want. So we have to have that, and that is the compact negotiation and litigation if need be. That is the provision you have already made in the law to negotiate that.

Mr. MILLER. Thank you very much.

Thank you, Mr. Chairman.

Mr. RICHARDSON. I thank the Chairman.

Let me ask Mr. Ducheneaux to get back to the taxation issue. With regard to taxation, how does an Indian casino differ from, say, a casino in Nevada or in Atlantic City?

And let me just—since we did invite a number of governors and others to this hearing but they declined until we have a subsequent hearing—let me ask probably what they would ask. Why don't Indian tribes have to pay State taxes, and if not, why not? And lastly, in general, do States provide any services to Indian reservations?

Mr. DUCHENEAUX. Let me first start, Mr. Chairman, with the oft-quoted phrase that the power to tax is the power to destroy. The Federal Government, I believe, and some better lawyers than I can correct me if I am wrong, does have the power in certain areas to tax State governments. They don't. Income taxes with the Federal Government are not levied upon the revenues tax or otherwise of a State, and many States and a growing number of them are realizing nontax revenues.

Many of them are, as you know and as we know, are involved in gaming, commercial in that sense, commercial but governmental gaming, lotteries that the Chairman of the full committee and Mr. Alexander were talking about, they derive revenues from leases of State lands. These are not tax revenues, these are the revenues of a proprietor of lands. They derive revenues from oil—from their own lands and from Federal lands—they derive revenue, yet the Federal Government does not levy a tax on the State governments, and they shouldn't. They shouldn't.

Presumably the revenues of a State are used for public purposes to meet their obligations as a government, so obviously the Federal Government should not assess its taxes against a State as a State. Nor does a State levy its taxes upon, as I indicated in my testimony, revenues that a county or municipal government might derive from liquor sales. It is ridiculous to assume that they would. It is ridiculous. Yet everyone—either those who make these charges about tribes not making tax payments, either ignore the fact or are ignorant of the fact that Indian tribes are governments whose form of government predate the United States itself or wish that they weren't.

The revenues, as Mr. Alexander pointed out, come from the tribal casinos and gaming enterprises as governmental revenue, no different than the oil and gas revenue of a State. They are used for public purposes. The act, as Mr. Alexander pointed out, restrict their use that the tribes can put them to, and their public purposes. The tribes use them—and you will see this in your hearings, Mr. Chairman—use them for a wide variety of purposes where the Federal appropriations that they are entitled to are not adequate, health clinics and child care clinics and housing and scholarship, just a myriad of different kinds of uses, so they ought not to be taxed. I think that is a simple answer.

Mr. RICHARDSON. Now, Mr. Ducheneaux, why do you think compacting has worked well in Minnesota and not in other States? Obviously the reason I say that is we don't seem to have Minnesota problems the way we have had with Arizona and many other entities.

And let me just conclude my questions to you by, I take it in your view that the gaming Act was a delicate compromise, and I remember working on it, and you were active in it, and in your view, can the Act work if left alone?

I have asked you two questions, so if you could just take the first one on the compacting in Minnesota.

Mr. DUCHENEAUX. I think I would answer maybe the first one in two or three ways. One, I think that there was at the time that those compacts were brought about to some extent some very enlightened State officials who chose to act in good faith in carrying

out the—or in attempting to implement—the authorities of the Indian gaming regulatory act.

Secondly, in the State of Minnesota, the Indian tribes had early gotten together and established their own base marks of negotiation. They were reasonable in their negotiations, the State was reasonable, and they met somewhere in the middle. There is an active role of the States in the regulation of class III gaming in Minnesota, an active role. The compacts provided in all cases because they were uniformly negotiated that the tribes would assist the States in meeting some of the costs of their regulations. So that was the case, but I think the other part of it was—and this is a negative part of it—the issue of the tenth and eleventh Amendment, which will be addressed in a minute or two, was not current at the time that these compacts were entered into.

So I think it is a combination of those factors and good faith, a reasonable willingness on the part of the State officials to recognize that Indian tribes are governments and have their own needs.

With respect to your second question about the Gaming Act, as you well know, and anyone who was in the Congress at that time knows, in 1987 and 1988, both in the courts and the Congress, Indian gaming was becoming a very hot controversial item, as it is today. The legislation was very delicately balanced, as you say, it was controversial, and a compromise was made at that time.

As I say in my statement, the Act did not confer rights on tribes; it took them away. It gave rights to the States, it balanced the interest and concerns, and there are some problems with it, but it has worked. I think if the State officials will allow it to work, it will work, it has worked, and I don't think there is any overriding need at this point to change it. I think these oversight hearings will go a long way towards showing that.

Mr. RICHARDSON. Mr. Alexander, let me get to a question regarding the *Cabazon* case. Public Law 83–280, as you know, generally disliked by tribes—especially in the six mandatory States and the other few that have adopted parts of it, and as you know, it basically allows State criminal law to be enforced on reservations—*Cabazon,* as you stated, arose in California, and basically the Gaming Act ends up applying the regulatory against the prohibitory tests to all of Indian country, even States that don't have Public Law 280.

What in your judgment does this do to tribal sovereignty and do you think that every time that we apply the *Cabazon* case that this diminishes tribal sovereignty? It sounds like a lawyer question to a lawyer.

Mr. ALEXANDER. Yes.

Mr. RICHARDSON. Although I am not a lawyer.

Mr. ALEXANDER. Okay. Well, to start in the beginning, in a sense the entire treatment of adopting the *Cabazon* standard across Indian country restricts tribal sovereignty. As Frank mentioned earlier, using the class III negotiation compact provision compounds that offense, if you will, by providing for State jurisdiction in some areas.

I think Congress at the time was struggling with trying to find a test that was realistic. And you will notice in the class III definition, there is a slight modification of the definition. And to pick up

on Chairman Miller's point earlier, the realistic attempt to try to find what it was that States were really permitting and not just to look at the black letter law on the top of the page of the code book, but to see whether or not as the public policy of the State, the State was allowing gambling of any sort or any kind to be run by any person, permitting the Montana situation.

So absent some other formulation, I think basically Congress came up with the best one it could in that circumstance, but it is a restriction on tribal sovereignty.

Mr. RICHARDSON. Paul, getting——

Mr. ALEXANDER. That is a lawyer answer.

Mr. RICHARDSON. A short answer, and I think it basically answers my question. I wish we had more time to explore it.

Let me ask you a question about the allegations of organized crime in Indian gaming enterprises today. Is there anything precluding the Justice Department from investigating and prosecuting such allegations today?

Mr. ALEXANDER. Not under existing law, absolutely not.

Mr. RICHARDSON. Would your clients encourage such activity by the Justice Department if it were necessary?

Mr. ALEXANDER. Where our clients have found people violating their ordinances or any suspicion, they have reported them to the U.S. Attorney, to the FBI, and in some situations to the county sheriff.

The bottom line that we should not lose sight of here is, these are tribal revenues. The tribe as the entity on the ground has the obligation and the duty to its people to protect those funds. That has not been a question.

Mr. RICHARDSON. Let me ask you about the good faith language in the Indian Gaming Act. As you know, States are asserting that tribes have the upper hand in the compacting process because of the obligation on the States to negotiate in good faith. Explain your reasoning for the provision in the Act and tell the committee why it is there.

Mr. ALEXANDER. Well, under the compact provision if you did not have either an automatic trigger or a balance to give the tribe some power, you basically could have a State sit down at the table and negotiate for the next 200 years, and you wouldn't have any compact. The tribes without a balancing provision in a sense don't have equality under the compacting provision.

It is very clear language in the Senate report acknowledging that this equilibrium, if you will, of power between the tribe and the State in the negotiating process and the good faith provision was designed deliberately by Congress to try to put some balance back into that negotiating procedure, that is what it is—Frank, do you want to add anything?

Mr. RICHARDSON. Mr. Ducheneaux, very briefly.

Mr. DUCHENEAUX. It will be very brief. I just wanted to point out again in response to your question and supplementing Paul's, prior to the enactment of the Indian Gaming Regulatory Act, the States had no role whatsoever to play on regulation on the reservations under the *Cabazon* decision. The court had said the State has no role, once it makes that threshold decision.

The Indian Gaming Regulatory Act in the class III context took that right away from the tribes, took it away from them, and what we got back was the compact that the tribe and the States then could sit down and negotiate a compact. It put the State in the driver's seat, completely in the driver's seat, as Paul has pointed out, and the only way to balance that reversal of positions was to give the tribes access to the Federal court and impose some standard of good faith on the States in negotiation, and good faith is a standard that the courts have applied for years in the area of labor law.

Mr. ALEXANDER. To be real precise about it, at the time in 1988 most of us were worried that the good-faith provision wasn't strong enough for the tribes to have some sort of balance in the negotiating process, so it is an irony to find the States raising it five years later.

Mr. RICHARDSON. Thank you.

Craig, do you want to conclude?

Mr. THOMAS. No.

Mr. RICHARDSON. I want to thank the witnesses for appearing. Thank you very much. Thank you both.

For the second panel, I would like to ask Ms. Susan Williams of Gover, Stetson & Williams on behalf of the Shoshone Tribe, Yavapai-Apache Tribe, and Pueblo of Tesuque to step forward; Mr. Jerry C. Straus, Hobbs, Straus, Dean & Wilder, on behalf of the Menominee Tribe of Wisconsin and the Seminole Tribe of Florida; Mr. Glenn M. Feldman, O'Connor Cavanagh, Anderson, Westover, Killingsworth and Beshears, that is a law firm, on behalf of the Cabazon Band of Mission Indians of California, Santa Ynez Band of Mission Indians of California, Cocopah Tribe of Arizona, Kickapoo Nation of Kansas, Comanche Tribe of Oklahoma, and Absentee Shawnee Tribe of Oklahoma.

Mr. Feldman, those are impressive and long credentials.

I would like to welcome the three of you. I would like Susan Williams, who is the attorney speaking on behalf of two tribes including my colleague's tribe in Wyoming, and I would also like to claim Ms. Williams as a constituent of mine, and with that, we give her the courtesy of initiating the second panel. Please proceed.

PANEL CONSISTING OF SUSAN M. WILLIAMS, GOVER, STETSON & WILLIAMS, ON BEHALF OF SHOSHONE TRIBE, YAVAPAI-APACHE TRIBE, AND PUEBLO OF TESUQUE; JERRY C. STRAUS, HOBBS, STRAUS, DEAN & WILDER, ON BEHALF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, MENOMINEE TRIBE OF WISCONSIN AND SEMINOLE TRIBE OF FLORIDA; AND GLENN M. FELDMAN, O'CONNOR, CAVANAGH, ANDERSON, WESTOVER, KILLINGSWORTH & BESHEARS, ON BEHALF OF CABAZON BAND OF MISSION INDIANS OF CALIFORNIA, SANTA YNEZ BAND OF MISSION INDIANS OF CALIFORNIA, COCOPAH TRIBE OF ARIZONA, KICKAPOO NATION OF KANSAS, COMANCHE TRIBE OF OKLAHOMA, AND ABSENTEE SHAWNEE TRIBE OF OKLAHOMA

STATEMENT OF SUSAN M. WILLIAMS

Ms. WILLIAMS. Thank you, Mr. Chairman, Congressman Thomas. I appreciate this opportunity to testify.

I would like to address a number of the issues that were raised in the questions earlier, but before I do that, I would like to make five principal points. One is that the tribes that I represent support the efforts of Interior Secretary Babbitt, Congressman Richardson, Congressman Thomas and the others on this committee, as well as Senator Inouye and Senator McCain on the Senate Select Committee on Indian Affairs, and your effort to try to define an approach through these hearings that is acceptable to both the tribes and the State with regard to what is to be done about the concerns on Indian gaming.

We do believe that all of you are deeply committed to the principles of tribal sovereignty and the governing congressional mandates in this case, which is to encourage tribal self-sufficiency and economic development on the Indian reservations. We are firmly committed to this process and to supporting the efforts of the Congressmen and the Senators to find some sort of mutually acceptable solution.

My second initial point is that our clients believe strongly that the Indian Gaming Regulatory Act currently allows the States the ability that they need to control the scope of the games in which Indian tribes may engage.

If a particular State is unhappy with the course of compact negotiations from the standpoint of State public policy or State interest in gaming, all a State needs to do is pass a law prohibiting that type of game from being played in the State. States have control through their public policy. That is what was contemplated by IGRA. Anything else that a State does not specifically prohibit as a matter of public policy is on the table with respect to Indian compact negotiations and, Congressmen, we would submit properly ought to be on the table with respect to those compact negotiations. But again, in the final analysis, if a State does not want a particular form of gaming to occur, all it needs to do is prohibit that form of gaming, and that is off the table insofar as compact negotiations are concerned.

Consistent with my second point, my third point is, then, that all of our clients are firmly opposed to any amendment of the Indian Gaming Regulatory Act that would increase State jurisdiction over

Indian gaming. As several points have been made in the earlier panel, States have adequate control under the existing law. Not only may they prohibit games that are against State public policy and therefore take these games off the table in terms of compact negotiations, but if you look at the 75 or so compacts that have been agreed upon between tribes and States elsewhere, you look at the role that States play, they have a very substantial role in tribal gaming on Indian reservations, and that role was specifically contemplated by IGRA and that was a significant loss of Indian tribal sovereignty.

No more State role needs to be specifically authorized by Congress. And let me cite one example in the case of Arizona where our client, the Yavapai Apache Tribe is located. Under the compacts that are being proposed in that State where there has been enormous controversy over the scope of Indian gaming, the State plays a very vital role in regulation of the games with respect to those non-members non-Indians who might participate in tribal gaming as management consultants or as managers, employees of the tribal games.

In Arizona, the non-Indian has to be licensed both by the tribe and "certified" by the State. Extensive background checks are required by the State gaming agency as well as the tribal gaming agency. If the State refuses to certify a particular non-tribal member, key employee because of the background investigation that was conducted and the tribe decides to license that employee anyway in the extraordinary case, well, then the State has an opportunity to put the matter to arbitration and eventually Federal district court as a breach of the compact.

So, Congressmen, I would submit in a very real and direct way the States have a role to play and can through appropriate intergovernmental compromises in these compacts with regard to the very concerns that many of you have expressed, that is, what about non-tribal members and their role in the games.

I would also add, Mr. Chairman, that in addition to that sort of regulation by the State, the National Indian Gaming Commission has to approve all management contracts executed between the tribe and any potential manager. In the course of that, the National Indian Gaming Commission is required to determine whether the background checks that were conducted by the State or the tribal governments are adequate as information regarding the particular key employee, and there is very broad authority under the Indian Gaming Regulatory Act for the gaming commission to deny these management contracts with non-tribal member managers, et cetera, on very broad grounds, including their past and prior associations, their reputations, and any evidence that their activity or presence in the games will endanger or create a threat.

So I would submit, Congressman Richardson, Congressman Thomas, that there is adequate, and I would say extensive regulation of the existing tribal games.

My fourth point will be that our tribal clients will oppose any legislation that either punishes tribes for not currently having class III games or compacts and rewards States like New Mexico for their illegal refusal to negotiate in good-faith compacts for class III gaming.

As the Chairman of the subcommittee knows all too well, in New Mexico the governor has refused to negotiate compacts with the States there, raising the tenth and eleventh Amendment defenses. That takes completely off the table any sort of reasonable intergovernmental accommodation as contemplated by IGRA, and we are very concerned that there not be any grandfathering or any other mechanism employed in any possible amendments that would reward those States who have just flatly refused to negotiate in good faith as contemplated by the Indian Gaming Regulatory Act.

My fifth and final point is that we support strongly legislation designed to reduce tribal reliance on gaming by encouraging other forms of economic development on Indian reservations. This committee knows all too well that over the course of Indian history the Congress has dramatically reversed itself from time to time so that we have a patchwork of State laws that apply in some instances and State jurisdiction that apply in some instances on Indian reservations. And as a result of a number of Supreme Court decisions, we have extensive layered State and tribal regulation in many instances on Indian reservations. That triple regulation, Federal, State and tribal in tax, environmental laws, liquor laws, adjudication of water rights, that is what is crippling economic development on the Indian reservations.

For the Congress to take the one opportunity that tribes have seen to have gainful revenues for tribal government purposes away without considering all of these other very serious Federal policy problems, I think would be a serious mistake and would be a violation of the United States trust responsibility to Indian tribes.

We would recommend, Chairman Richardson, that in the course of the discussions, that this committee encourage States to begin supporting us. If, in fact, the States are true to their word that they care about tribal economies and tribal self-determination, then I would like to see States assisting us in our efforts to find out ways to deal with the problem of dual and multiple taxation, and perhaps we could find ourselves in a position of having State support measures by this committee to do any number of the following things.

One, prohibit or in some way address the problem of State taxation of any person, property, activity over which the tribes have jurisdiction to tax.

Prohibit the application of State and local environmental and zoning laws to persons, property and activities within Indian country.

Amend the Internal Revenue Code to allow tribes to issue tax-exempt bonds for the same purposes that States may do so. That is presently not the law, Chairman Richardson.

Modify the volume caps in such bonds to reflect the small populations and the greater need for capital on Indian communities and their reservations.

Repeal the Federal statute granting States concurrent jurisdiction over liquor sales on Indian reservations.

Amend Public Law 83–280 to require States to retrocede any jurisdiction they may have acquired without the request of an Indian tribe.

Repeal the McCarran amendment, which gives State courts jurisdiction to adjudicate tribal reserve water rights.

And ensure in all instances that where States are given Federal funds and special treatment by the Federal Government that those same considerations be extended to tribal governments.

Chairman Richardson, this list is not all inclusive, but it demonstrates my point of the importance of Indian gaming and provides you with the important backdrop to why tribes are so reliant on Indian gaming. And if the committee and the governors of this Nation are concerned about Indian tribes having diversified economies not solely reliant on gaming, these very important issues must be addressed by the governors and by this committee.

I wanted to add one point that Congressman Richardson asked one of the panelists earlier, about whether the law as it is written can work without any change at all. I would simply add only one additional point because I think the law the way it is written does work. It does not need to be changed if the States and tribes will be reasonable, if the States want to take things off the table, then let them pass prohibitory laws so they be very clear on that side of the balance.

But there is one problem that I think needs to be addressed by the committee, and that is the States' obligation to negotiate in good faith. For those States that are raising sovereign immunity, the tenth and eleventh defenses, that is bad faith. That will undermine the very essence of the compromises between governments contemplated by this committee, and unless the States take that, reverse their position on raising these defenses, I am not sure what they are worried about, they should let this matter go forward on the basis of mediators chosen by both parties, let these issues be decided, take it out of the governors' political arena, if necessary, and let the matter go forward.

I am not sure what the States are concerned about, but if they continue to stop good-faith negotiations through these defenses, then I would say perhaps it is a matter—and this is the sole matter on which Congress may wish to devote some of its attention.

I thank you, Chairman Richardson, and would be happy to answer any questions that the committee might have.

[Prepared statement of Ms. Williams follows:]

TESTIMONY REGARDING INDIAN GAMING
BY SUSAN WILLIAMS OF GOVER, STETSON & WILLIAMS, P.C.
ON BEHALF OF
TESUQUE PUEBLO, NEW MEXICO
THE SHOSHONE TRIBE, WYOMING,
AND
THE YAVAPAI-APACHE TRIBE OF THE CAMP VERDE RESERVATION, ARIZONA,
BEFORE THE COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
JUNE 7, 1993

Indians living on reservations are the poorest of the poor. Many reservations are in remote locations on lands that have few natural resources. Attempts to stimulate economic development on reservations have, with limited exceptions, failed. Consequently, most tribal members, are heavily dependent upon federal and tribal government general assistance. Indian gaming, however, has provided a means for many tribes to escape this vicious cycle of poverty that hinders both the federal and tribal governments. For example, a 1991 study conducted by the Minnesota Indian Gaming Association concluded that, since Minnesota's first Indian gaming casino opened in 1984, Indian gaming had provided a means of achieving what Federal policy had failed to accomplish over the past hundred years: economic self-sufficiency and independence. In fact, Indian gaming is now a $2 billion a year industry.[1] In addition to reducing tribal unemployment and welfare dependency, Indian gaming also provides tribal governments with desperately needed revenues to fund educational programs, housing projects, medical facilities, job training, and other worthwhile projects that promote economic self-sufficiency not only on the reservation but in the surrounding region that benefits from the increased trade due to gaming. Indian gaming, although by no means a panacea, has been one of the few success stories with respect to reservation economic development, and any effort to curtail Indian gaming would be a serious mistake. Not all tribes will opt for gaming as a means of economic development, but those tribes that choose this route should not be hampered in their efforts. It is in the interest of everyone, including non-Indians, that tribes become more self-sufficient and less dependent on federal financial assistance. In order to do this, tribes must be able to maintain the small competitive niche in the gaming industry that is contemplated by the Indian Gaming Regulatory Act ("IGRA"). If tribes are made subject to state law limits regarding how state-permitted games are to be played, this niche will be lost. But, significantly, no doubt can exist that IGRA does not contemplate that Indian gaming would be allowed that is prohibited by state law.

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1 Final Survey Report on Implementation of the Indian Gaming Regulatory Act, compiled by Assistant Inspector General for Audits, United States Dep't of Interior.

Many tribes have virtually no other means to become economically self-sufficient. Some of the reasons for the inability of tribal governments to develop flourishing reservation economies, absent gaming, are obvious. Reservations often have limited infrastructure. Further, tribes often have limited experience in the business world and in capital formation. One of the most impenetrable barriers to economic development, however, is the direct result of state governments interfering in reservation affairs. The states routinely claim the authority to tax reservation enterprises even where a tribe is taxing that enterprise and a state provides little or no services to either the enterprise or that Indian community. This results in a ruinous double tax burden on reservation enterprises that discourages investment of capital and inhibits the formation of new businesses on the reservation. Similarly, the states often claim the authority to impose their regulatory laws on the reservations, thus subjecting businesses to federal, state, and tribal regulations, which discourages investment in or prohibits altogether activities that might profit the Indian community. As a result of all these obstacles, it is extremely difficult for tribes to stimulate investment on the reservation. The reality is that, for many tribes, Indian gaming not subject to state law and regulation without limits other than through inter-governmental accommodations, is the only realistic way to escape from poverty.

Indian gaming contributes to the off-reservation economy as well. Because there are no other commercial businesses on most reservations, virtually all of the money earned by gaming employees is spent in surrounding non-Indian communities. Further, tribal gaming facilities have spent millions of dollars locally for the construction of buildings, as well for food, beverages, paper goods, and maintenance supplies. Indian gaming, therefore, clearly benefits not only Indian tribes but local communities that are located near the reservations. Further, Indian gaming establishments employ a substantial number of non-Indians. In San Diego County alone, Indian gaming has been responsible for the creation of more than 1500 good-paying jobs, many to non-Indians, with a payroll of $22 million per year (and associated payroll taxes and employee income taxes).[2] In Minnesota, Indian gaming has become the seventh largest employer in the entire state, and, in Connecticut, a single Indian gaming facility will provide more revenues to the state than its largest taxpayer, one of the country's largest defense contractors.[3]

Given the critical role that Indian gaming has played to the economic development of many Indian tribes, as well as surrounding off-reservation economies, Congress should not limit Indian gaming, but instead should encourage it to flourish under the existing law. The federal government, it must be remembered, owes a trust duty to Indian tribes to protect not only their lands but their governments. Worcester v. Georgia, 31 U.S. (6

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2 Joint Task Force on Indian Gaming, compiled by the National Indian Gaming Association and the National Congress of American Indians, at page 6.

3 Id.

Pet.) 515 (1832). This trust duty has been specifically implemented by congressional mandates that, inter alia encourage the development of Indian reservation economies. Indian Self-Determination and Educational Assistance Act of 1974, 25 U.S.C. §§ 450 et seq. Thus, the curtailing of a vital source of tribal revenue without providing meaningful development alternatives is inconsistent with federal fiduciary obligations to Indian tribes.

Those opposed to Indian gaming base their opposition on misinformation and conjecture, and many opponents simply wish to protect their gaming business from any competition, especially from tribes. These attacks are grossly unfair. Important national interests favoring protection of tribal governments should not be subordinated to private pecuniary gain. One of the most common misstatements made about Indian gaming is that it is prone to infiltration by organized crime. There simply is no evidence to support such an accusation. In fact, in oversight hearings before the Senate Select Committee on Indian Affairs in 1992, the Department of Justice testified that there was little evidence of any infiltration by organized crime in Indian gaming.[4] Moreover, the IGRA requires tribal governments to perform extensive background checks on all management officials and key employees, and there is no evidence that tribes are incapable of screening out undesirable business associates. Further, the National Indian Gaming Commission ("NIGC") reviews and makes recommendations to the tribes on all license applications, thus providing yet another means of ensuring that undesirable persons are not allowed to engage in Indian gaming. The NIGC, moreover, may disapprove management contracts required to be submitted to it under IGRA if key personnel have prior activities, including but not limited to criminal activities, a reputation or associations that pose a threat to the public interest or to effective regulation, or which enhance the dangers of unsuitable, unfair, or illegal gaming practices on reservations. And, under Class III compacts, many states assist tribes in regulating the reservation gaming industry. More than anyone else, tribes understand the importance of safeguarding their gaming industries from even the hint of impropriety, because of the importance of gaming to tribes' economic and social welfare.

Another common misperception about Indian gaming is that Indian tribes are granted "special" privileges and are allowed to engage in gaming that is prohibited off the reservations. This is not true. Under IGRA, if a state prohibits a particular type of gaming, Indian tribes may not engage in that type of gaming either. Several federal court decisions have upheld this interpretation of the IGRA.[5] Thus, if a state decides that it does not want a particular type of Class III gaming to take place, all the state has

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[4] Oversight Hearings Before the Select Committee on Indian Affairs on the Implementation of the Indian Gaming Regulatory Act (March 18, 1992)(statement of Paul L. Maloney, Senior counsel for Policy, Criminal Division, Department of Justice).

[5] See e.g. Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d. Cir. 1990), cert. denied, 111 S. Ct. 1620 (1991).

to do is pass a law that prohibits any entity to engage in such gaming for any purpose. On the other hand, if the state allows such gaming to take place, the state has no public policy prohibiting such gaming.

Before passage of the IGRA, the United States Supreme Court made it clear that states do not have the right to impose regulatory laws on Indian tribes' games. Cabazon v. California Band of Mission Indians.[6] Hence, if states merely regulated certain types of gaming (such as allowing certain types of games to take place but in limited circumstances), then the state clearly had no right to impose such regulations on tribes. State criminal law prohibitions, of course, also would not apply unless Congress specifically authorized the prohibitions, which it had done only in those states qualified under Public Law 280. The Cabazon civil regulatory and criminal prohibitory distinctions appear to have been borrowed by Congress and incorporated into the IGRA for gaming purposes nationwide, and any contention that the IGRA gives tribes any unfair or "special" rights thus is unfounded. In fact, the tribes lost some of their rights recognized in Cabazon under the IGRA. Cabazon recognized the inherent right of tribes to engage in gaming not prohibited by state law without having to get any state approval. The IGRA now requires tribes to execute tribal/state compacts in order to conduct such gaming; and state prohibitory laws now limit tribes' gaming nationwide. These provisions of the IGRA were a major concession by the Indian tribes, and the contention that the IGRA grants tribes special rights is just wrong.

Those opposed to Indian gaming have proposed that tribes be subjected to all state regulatory laws regarding gaming, including pot sizes, wager limits, hours of operation, and whether the games may be operated for profit or only for charity, etc. This proposal, in effect, would overrule the Cabazon decision and allow states to impose their own regulatory laws on Indian tribes. The IGRA endorses the Cabazon rule, and there is no reason to reverse this position now. Under IGRA (and Cabazon), tribes may undertake all gaming that is not prohibited by state law, without state regulation on wagers, pot limits, etc. States must acknowledge this backdrop law pursuant to their obligation to negotiate compacts in good faith. On the other hand, under IGRA, tribes are allowed to conduct only those games, free of state regulation, that state law permits. Thus, states presently are not facing the specter of unlimited reservation gaming. And, of course, tribes too must consider state concerns in the inevitable inter-governmental compromises encouraged by IGRA for Class III, or high stakes, gaming on Indian reservations.

Most states have proven completely unresponsive to the severe economic needs of tribal communities, and we see absolutely no reason to believe that, if states are given further authority over Indian gaming,

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[6] 480 U.S. 202 (1986). In this case, if the state gaming law had been prohibitory, the state would have had jurisdiction over the tribal gaming facility to impose state law under Public Law 83-280, Act of Aug. 15, 1953, 67 Stat. 288. The Court's ruling on the civil regulatory authority was relevant to tribes nationwide.

other than through tribes' agreement in compacts, states will exercise this authority in ways that advance tribal interests. Therefore, any attempt to grant additional regulatory authority to states over Indian gaming is misguided and should be rejected. I will be happy to answer any questions the Subcommittee may have, and, again, thank you for the opportunity to testify on this vitally important matter.

Mr. RICHARDSON. Thank you.
Mr. Straus.

STATEMENT OF JERRY C. STRAUS

Mr. STRAUS. Mr. Chairman, I very much appreciate the opportunity to appear here this morning and present testimony in this most important matter.

I would like to begin my remarks by reverting to something raised by Chairman Miller and the concerns of the States that somehow the compact negotiation process has worked unfairly to the States and that they have lost control of the process. If you look at the context of actual litigation that has occurred, the truth is that the act has not been given a chance to work by the States.

There are two cases and two cases only where tribes have been successful in achieving compacts or the equivalent of compacts known as procedures over the objection of States, and that is the *Pequot* case that everybody talks about and the *Lac du Flambeau* case in Wisconsin.

In the *Pequot* case in Connecticut, the State of Connecticut did the one thing that absolutely you cannot do in a good-faith negotiation. It never came to the table. They never showed up. It is no wonder that the court ruled against them.

In the *Lac du Flambeau* case in Wisconsin, the State failed to perfect its appeal. They didn't file their appeal on time, and the appeal was dismissed. Those cases are sui generis; those cases are unique.

We don't know yet how the Act will be interpreted by the Federal courts because in 10 other States, the States have completely blocked the process by asserting the tenth and eleventh Amendment as bars to the litigation, and yet they have the nerve to come to Congress and say, Oh, please relieve us of this terrible burden. They have not allowed the process to work that Congress set down, and it is very ironic that they have done this because it was the States that demanded this process, the States wanted to be involved in the regulation of Indian gaming. Tribes wanted the matter to be handled federally, but the States said, No, we know how to do this better. We have a very important stake here, we want to participate. And they compromised, which worked out to allow that, and now they come and say, No, no, that isn't working right, that isn't working right. It isn't working right, because they haven't allowed it. They made some bad mistakes in the initial litigation, and now they want Congress to bail them out without giving the process a chance to work.

And it has got to be remembered that no tribe has a right to do class III gaming under the IGRA compromise unless they can get a compact, and no compact is automatically achieved. The State's only obligation is to bargain in good faith, and if the State bargains in good faith, as that term is ultimately defined in the courts, there is nothing more that will happen without the consent of the State.

The State still has a powerful right to either block or shape the form of Indian gaming. That is why the tribes were very unhappy with this statute when it was passed, and there was a lawsuit brought in the District of Columbia by tribes to have the Act declared unconstitutional because it was feared that the rights given

to the States were far superior to the rights that were remaining to the tribes under this process.

And it also has to be remembered in the light of the tenth and eleventh Amendment arguments that the State is not actually required to do anything. The State can sit back and do nothing. If the State does nothing, a mediator is appointed, and if the State doesn't respond to the mediation, the matter goes to the Secretary. The mediator will select a compact that the tribe proffers perhaps.

If the State doesn't want to sign that compact, the matter goes to the Secretary of the Interior, and it becomes exclusively a matter of Federal regulation, which is what the tribes wanted in the first place and what the States insisted was not the right course of action.

The only time the State is obligated to engage in this process is if the State wants to participate in the regulation. If it wants to leave this to the Federal Government, it is free to do so.

Now, the States' argument under the eleventh Amendment is really shocking to me because they are saying that they have a right in terms of Indian affairs that has not been recognized since the Constitution was written. They are saying that Congress, even though it has plenary power over regulation of Indian affairs, does not have the power to provide a mild remedy. The remedy of mediation is what we are talking about in this area to redress the balance between the tribes and the States. They are trying to rewrite history. They are trying to go back to what was provided in the Articles of Confederation where there was a different provision where States retained power to regulate Indian affairs, and the result was chaos.

I hope that this Congress recognizes what the States are doing for what it is and takes appropriate action.

[Prepared statement of Mr. Straus follows:]

STATEMENT OF JERRY C. STRAUS
BEFORE THE
NATIVE AMERICAN AFFAIRS SUBCOMMITTEE,
HOUSE NATURAL RESOURCES COMMITTEE
ON
STATE CONSTITUTIONAL CHALLENGES
TO THE COMPACTING
PROVISIONS OF
THE INDIAN GAMING REGULATORY ACT

June 7, 1993

Mr. Chairman:

My name is Jerry C. Straus, of the firm of Hobbs, Straus, Dean & Wilder, and I am an attorney for the Seminole Tribe of Florida, the Menominee Indian Tribe of Wisconsin and the National Congress of American Indians. I have attached to this statement a more comprehensive paper on the topic covered by my testimony, which was prepared jointly by me and Scott Crowell, Attorney for the Spokane Tribe of Washington, and I request that this paper be made a part of the record of these hearings.

I appreciate the opportunity to appear this morning to provide the Subcommittee with a tribal perspective on an important issue of Constitutional law that has arisen under the Indian Gaming Regulatory Act (IGRA). As the Subcommittee knows, some states have taken the position that Congress lacks power under the Eleventh Amendment to the U.S. Constitution to subject any state to suit in federal court for violation of tribal rights protected by federal law. They argue, on this ground, that the IGRA is unconstitutional in providing for tribal suits in federal court against states for failing to engage in good faith compact negotiations with tribes. Some states have also argued that the IGRA violates the Tenth Amendment provision that powers not delegated to the federal government are reserved to the states, because it forces the states to regulate tribal gaming.

While these arguments have been raised to defeat suits brought by tribes against certain states under the IGRA, they have far broader implications. The states' constitutional attack strikes at the heart of the deeply rooted historic relationship between the tribes and the federal government, and, if ultimately upheld in the federal courts, would undermine the plenary power of Congress under the Indian Commerce clause to regulate Indian affairs in the national interest.

It must be remembered that under the IGRA no tribe can engage in class III gaming without a compact negotiated with the state in which it is located. Recognizing that the states had an

overwhelming bargaining advantage in the compact negotiation process established, Congress gave tribes a way to enforce the states' compact obligations by waiving state immunity to suit in the federal district courts. In such a suit -- but only after a finding that a given state had not negotiated in "good faith" -- the courts are empowered to provide a remedy by ordering mediation, leading to a compact, or gaming "procedures" in lieu of a compact, achieved through the mediation process.

Initially, tribes strongly opposed IGRA's compacting provisions, viewing them as an unwarranted delegation of authority to the states over Indian gaming and an invasion of tribal sovereignty. Despite their misgivings, tribes have accepted IGRA and have played by the rules which the Congress laid down. The states, however, defy those rules when the rules don't suit their own special interests. States sometimes pressure federal authorities to take action against tribal gaming activities, which they assert are illegal under the IGRA because they involve Class III games operating without a compact. Yet those very same states are also arguing to the federal courts that they are not required to engage in the "good faith" negotiations leading to the compact which they say the tribe is required to have, hiding behind a spurious claim of Eleventh Amendment immunity.

I believe that the tribes have always had the better legal arguments on these issues, although eleven district courts have addressed them, with mixed and inconsistent results. Seven of those courts[1] have agreed with the states and held that Congress lacked constitutional authority to abrogate state Eleventh Amendment immunity. Three of those courts[2], have agreed with the tribes on the Eleventh Amendment issue and found that states are

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[1] Poarch Band of Creek Indians v. Alabama 776 F.Supp 550 (S.D. Ala. 1991) (dismissing State), 784 F.Supp. 1549 (S.D. Ala. 1992) (dismissing Governor), *appeal pending*, (11th Cir. #92-6244) (consolidated with Seminole); Spokane Tribe v. Washington, 790 F.Supp. 1057 (E.D. Wash. 1991) (dismissed State, but did not dismiss Governor), *appeal pending*, (9th Cir. ##92-35113 & 92-35446); Sault Ste. Marie Tribe v. Michigan, 1992 WL 713832 (W.D. Mich. Mar. 26, 1992) *appeal pending* (6th Cir.#); Ponca Tribe v. Oklahoma, (#92-988T W.D. Okla. Sept. 9, 1992) *appeal pending* (10th Cir. #); Pueblo of Sandia v. New Mexico, (#92-0613 JC, D. N.M. decided Nov. 13, 1992) *appeal pending* (10th Cir. ##93-2018, 93-2020, consolidated with Mescalero); The Apache Tribe of the Mescalero Reservation v. New Mexico, (#92-076 JC, D. N.M. Dec. 22, 1992) *appeal pending* (10th Cir. ##93-2018, 93-2020, consolidated with Sandia); Confederated Tribes of the Colville Reservation v. State of Washington et al. (CS-92-0426-WFN E.D. Wash. Oral decision from the bench, May 28, 1993; written decision imminent.)

[2] Seminole Tribe v. Florida, (#91-6756 D. Florida 1992) *appeal pending*, (11th Cir. #92-4652)(rejected 11th Amendment defense)(Consolidated with Poarch Creek); Cheyenne River Sioux Tribe v. South Dakota, (#92-3009 D.S.D. January 8, 1993) *appeal pending* (Eighth Cir.); Kickapoo Tribe v. Kansas, (#92-4283 D. Kansas March 29, 1993) *appeal pending* (10th Cir).

subject to the court's jurisdiction. Four of those courts[3] have agreed with the states that IGRA intrudes on powers reserved to the states under the Tenth Amendment while two courts have rejected the states' Tenth Amendment argument.[4]

Although less in number, the opinions upholding the constitutionality of IGRA, under the Tenth and Eleventh Amendments are superior in their reasoning and there is substantial ground to expect a favorable result on the appellate level, where the issues are under review by five different courts of appeals. While the Eleventh Circuit has already heard oral argument from the parties and a decision is expected at any time, a final result may still be a long time away since the issues involved may have to be ultimately decided by the United States Supreme Court.

The states' ongoing assault upon the IGRA compromise starts from the faulty premise that they have some inherent long standing right to regulate or curtail tribal gaming. To the contrary, the Supreme Court's landmark 1987 decision, in California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215, 107 S.Ct. 1083, 1091 (1987) settled the point that regulation of Indian gaming was not subject to state regulation, absent an express delegation of authority from the Congress. It follows from Cabazon that the only "rights" of states to be involved in the regulation of tribal gaming are the rights conveyed by Congress in IGRA's compacting requirements, the very requirements that states now assert to be unconstitutional.

(a) The Eleventh Amendment

The Eleventh Amendment to the Constitution simply provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or Subjects of any Foreign State.

By judicial interpretation, the immunity conferred has been extended to suits by citizens against their own states and, by further extension, to Indian Tribes. The essence of the states' Eleventh Amendment defense is the assertion that Congress lacks the power to subject states to suits by tribes, even in the exercise of the plenary federal power provided by the Indian

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[3]Ponca Tribe v. Oklahoma; Pueblo of Sandia v. New Mexico; The Apache Tribe of the Mescalero Reservation, and Confederated Tribes of the Colville Reservation v. State of Washington et al.

[4]Yavapai-Prescott Indian Tribe v. Arizona 796 F.Supp. 1292 (D. Ariz. 1992) *appeal pending* (9th Cir.) and Cheyenne River Sioux Tribe v. South Dakota.

Commerce Clause. Contrary to relevant and recent Supreme Court precedent, they argue that, without a state's consent to suit, the federal courts have no jurisdiction.

The states' argument is contrary to Pennsylvania v. Union Gas Company, 491 U.S. 1, 109 S.Ct. 2273 (1989), where the Court held that Congress has power to abrogate State Eleventh Amendment immunity to give effect to legislation in an area of federal plenary authority, such as Indian Commerce. As explained in Union Gas, the states consented to Article I plenary powers, including the power to abrogate state immunity, in the "plan of convention":

> . . . [T]o the extent that the states gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising its authority, to render them liable. The states held liable under such a congressional enactment are thus not "unconsenting"; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.

Union Gas, 491 U.S. at 19-20. Because IGRA is also an exercise of Congress' Article I power, it follows that its abrogation of state sovereign immunity is fully constitutional unless and until Union Gas is overruled.

The states cannot escape the Union Gas rule by arguing, as they have, that it cannot be applied to federal legislation under the Indian Commerce Clause. This argument ignores the fact that congressional power in Indian commerce is much more sweeping than congressional authority over interstate commerce. Unlike interstate commerce, Congress shares no authority with the states over Indian commerce unless Congress delegates that authority. The Supreme Court has repeatedly interpreted Congress' Indian affairs power as "plenary" and exclusive.

Congress may choose to share some of its power, as it did in providing the states with authority to compact. Congress may also choose to subject the states to suit by tribes for abuse of the privilege they have been given. The sweep of the Indian Commerce Clause is more than sufficient to support the limited abrogation of state immunity accomplished in IGRA. Because IGRA is an exercise of Congress' Article I power, the Act's abrogation of state sovereign immunity is constitutionally sound.[5]

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[5]Even if the courts somehow found Congress lacks power to abrogate state sovereign immunity under the Indian Commerce Clause, IGRA's abrogation of immunity should still be valid on the alternative ground that Congress enacted IGRA under its Interstate Commerce powers since the IGRA had, as one of its primary purposes, the control of organized crime. 25 U.S.C. § 2702(2).

(b) The Tenth Amendment

Some states also mistakenly argue that IGRA violates the Tenth Amendment provision that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States ... ." They argue that IGRA "forces" the states to regulate tribal gaming activities on Indian lands and that this compulsion amounts to an invasion of reserved state sovereignty.

This argument ignores the actual requirements of the IGRA. The truth is that nothing in IGRA compels the states to play any role or take any action in the regulation of tribal gaming. While it is true that states are obligated to enter into good faith compact negotiations, their failure to do so cannot result in any unwanted duty to regulate. At worst, if a tribal suit succeeds, and if a state refuses to enter into mediation or refuses to sign a compact selected by the mediator, then a state has abandoned its right to speak on the type of regulation that will govern tribal gaming within its borders. Instead, the Secretary of Interior, in consultation with the Tribe, is empowered to promulgate federal procedures in lieu of a compact.

The states' complaint under the Tenth Amendment is ironic. Their limited role in the regulation of Indian gaming is a direct result of their own demands that they have such a role, following the Cabazon ruling in 1987, where the Supreme Court ruled that Indian gaming was not an area in which state law could operate, absent a delegation of authority from the Congress. Congress granted the states' requests to be involved and now they assert that it has saddled them with an unconstitutional burden.

(c) If the states prevail on their constitutional attacks, IGRA fails in its entirety and Indian gaming would be regulated under the 1987 *Cabazon* decision

If the states do ultimately prevail in their constitutional challenge to IGRA's compacting provisions they will cause the entire regulatory scheme of IGRA to unravel. The courts would then have to decide whether or not the provisions attacked by the states could be severed from the balance of the Act. Since it cannot be seriously disputed that the compacting provisions of the IGRA were of controlling importance in the enactment of the Act, stripping these provisions from the statute would transform it into something far different from what Congress originally intended. It follows inevitably, in my opinion, that a determination that the compacting provisions are unconstitutional would carry with it a determination that IGRA, in its entirety, is unconstitutional. If the courts so rule, Indian gaming would be regulated exclusively under tribal and federal law, under the 1987 Cabazon decision, in the absence of a valid delegation of federal authority to the states.

Conclusion

The states have reneged on the deal that they proposed and Congress accepted in 1988 when it passed the IGRA by unjustly and wrongly asserting that the IGRA violates both the Tenth and Eleventh Amendments to the U.S. Constitution. Although the tribes have the better legal arguments on these issues, deeply rooted in the historical relationship between tribes and the federal government, states have found limited success on the merits in the lower federal courts and even where they lose on the issue, have succeeded in causing lengthy delay and in coercing some tribes into accepting unwarranted restrictions in compacts negotiated under IGRA's authority.

Attachments

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ATTACHMENT

STATES WRONGLY ASSERT THAT IGRA VIOLATES THE TENTH AND ELEVENTH AMENDMENTS TO AVOID FAIR DEALING WITH TRIBES

THE STATES HAVE UNFAIRLY SUBVERTED THE IGRA COMPACT PROCESS

State intransigence has caused a critical failure of the compact provisions of IGRA that were designed to accommodate the competing sovereign interests of tribes and states as to regulation of class III gaming. No tribe can engage in class III gaming on Indian lands without a compact negotiated with the state in which it is located. Recognizing the potential overwhelming bargaining power of the states, Congress provided for tribes to enforce the states' obligations to negotiate with the tribes as equal sovereigns by bringing suit in federal district court requesting that the dispute be resolved by mediation. Such litigation initiated by tribes against states preceded the successes of tribes in Connecticut, Minnesota, and Wisconsin. However, many states now assert that tribes have no remedy and that Congress has no authority to subject states to the jurisdiction of the federal courts, effectively undermining the compact provisions.

Initially, tribes strongly opposed IGRA's provision for compacts as an unwarranted grant of state authority over Indian gaming and an invasion of tribal sovereignty. As summarized by Senator Inouye:

> [W]hen the notion of tribal/state compacts was proposed, whereby tribes and states would sit down together on a sovereign-to-sovereign government basis -- this appeared to be a workable solution, particularly given the strong opposition of the Justice Department to a federal presence to work with tribal governments in matters of law enforcement and regulation of Indian gaming.
>
> But let us be clear about this. Even before the bill was signed into law, it became known as the "Nevada Bill." More specifically, Las Vegas interests were boasting that they deserved the credit for the provisions of the Indian Gaming Regulatory Act.

> The Act was not then, nor has it ever been viewed as the bill that the Indians would have wanted. Nor was it ever the Committee's bill. Those who now rush to characterize the Act as such are simply seeking to revise history to serve their own ends.

Statement of Senator Inouye to Tribal Leaders, March 19, 1993

Despite their misgivings, tribes have reluctantly accepted IGRA and have played by the rules as laid down by Congress. The states, however, defy those rules when the rules don't suit their own special interests. At the same time that states negotiate and sign compacts, supposedly under IGRA, and pressure federal authorities to take action against tribal gaming activities which are supposedly illegal under IGRA, those states are arguing to the federal courts that IGRA is unconstitutional.

When a tribe attempts to secure judicial enforcement of the state's obligation to negotiate a compact in good faith, the state asserts immunity from suit under the Eleventh Amendment to the U.S. Constitution, and further, that the Tenth Amendment renders unconstitutional any resulting obligation that the compact process may impose upon the state. This strategy has successfully obstructed and delayed many tribal efforts to use class III gaming as a source of employment and governmental revenue.

The tribes have always had the better legal argument on these issues. At least eleven district courts have addressed the issue, with mixed and inconsistent results. Six of those courts[1] have agreed with the states and held that Congress lacked constitutional

[1] Poarch Band of Creek Indians v. Alabama 776 F. Supp 550 (S.D.Ala. 1992) (dismissing Governor), appeal pending, (11th Cir. No. 92-6244) (consolidated with Seminole); Spokane Tribe v. Washington, 790 F.Supp. 1057 (E.D.Wash. 1991) (dismissed State, but did not dismiss Governor), appeal pending, (9th Cir. Nos. 92-35113, 92-35446); Sault Ste. Marie Tribe v. Michigan, 1992 WL 713832 (W.D. Mich. Mar. 26, 1992) appeal pending (6th Cir.) Ponca Tribe v. Oklahoma, (No. 92-988T W.D. Okla. Sept. 9, 1992) appeal pending (10th Cir.); Pueblo of Sandia v. New Mexico, (No. 92-0613 JC, D.N.D. decided Nov. 13, 1992) appeal pending (10th Cir. Nos. 93-2018, 93-2020, consolidated with Mescalero); The Apache Tribe of Mescalero Reservation v. New Mexico, (No. 92-076 JC, D.N.M. Dec. 22, 1992) appeal pending (10th Cir.

authority to abrogate Eleventh Amendment immunity. Three courts[2] have agreed with the states that IGRA intrudes on powers reserved to the states under the Tenth Amendment. Four courts[3], including the two most recent decisions, have agreed with the tribes and found that states are subject to the court's jurisdiction. Although inferior in number, those four opinions are superior in their reasoning. Unfortunately, in most cases even if the tribes win, they functionally lose, because the decision is immediately appealed, and the tribe's substantive claims are put on hold while the appeals courts slowly deliberate the issues. Five different circuit appeals courts are now considering the issues. The Eleventh Circuit Court has already heard oral argument from the parties in the consolidated Seminole and Poarch Creek suits and a decision is expected at any time. The two most recent cases have ruled in favor of the tribes, and those tribes are confident that the appellate courts will ultimately rule in their favor. However, the final result is not certain, and may still be a long time away. Congress should delay no longer in eliminating entirely the uncertainty that states have created.

Nos. 93-2018, 93-2020, consolidated with Sandia).

The Spokane Tribe decisions is unique in that it dismissed Washington State as a party defendant, but retained jurisdiction over the Governor and other state officials in their official capacities. The Court ruled that the Tribe's request for prospective equitable relief that state officials comply with federal law falls within an exception to 11th amendment sovereign immunity first developed in Ex Parte Young, 209 U.S. 123, 28 S.Ct.441 (1908). These official capacity lawsuits should be distinguished from personal capacity lawsuits. In the Spokane Tribe's litigation, no claims have been made against the Governor in his personal capacity.

[2] Ponca Tribe v. Oklahoma; Pueblo of Sandia v. New Mexico.; and The Apache Tribe of Mescalero Reservation v. New Mexico.

[3] Seminole Tribe v. Florida, (No. 91-6756 D. Florida 1992) appeal pending, (11th Cir. No. 92-4652) (rejected 11th amendment defense) (consolidated with Poarch Creek); Yavapai-Prescott Indian Tribe v. Arizona 796 F.Supp. 1292 (D. Ariz. 1992) appeal pending (9th Cir.) (rejected 10th Amendment defense); Cheyenne River Sioux Tribe v. South Dakota, (No. 92-3009 D.S.D. January 8, 1993) appeal pending (8th Cir.) (rejected both 10th and 11th Amendment defenses); Kickapoo Tribe of Kansas, (No. 92-4283 D. Kansas March 29, 1993) appeal pending (10th Cir.) (rejected 11th Amendment defense).

In a June 16, 1992 letter to the National Governors' Association, Senators Inouye and McCain cautioned the states to comply with IGRA's intent or to expect strong remedial congressional action:

> The actions of those states that have asserted the Eleventh Amendment or that have refused to enter into negotiations and have announced the state's intention to assert the Eleventh Amendment, compel us to take action to provide for a workable framework for the conduct of class III gaming on Indian lands. If, by asserting the Eleventh Amendment, the states are indicating that they wish to have no role to play in the regulation of Indian gaming operations, it would seem that we are left with the alternative of having the federal government negotiate compacts with the tribal governments for the conduct of class III gaming, and of comprehensive federal regulation of Indian gaming.
>
> .....
>
> Accordingly, we pose this fundamental question to the governors of the concerned states: Is it your desire to have the state government involved in the negotiation of tribal/state compacts and the regulation of class III gaming on Indian lands consistent with state law, as currently authorized by the Indian Gaming Regulatory Act, or is it your desire to have the United States assume exclusive responsibility for the regulation of class III gaming on Indian lands?

Inouye - McCain letter. June 16, 1992, pp. 2-3

The states have ignored the Senators' letter. Since last June, the states have repeatedly raised these defenses as leverage in virtually every compact negotiation session. Twenty states have now either raised the issue in court or signed onto amici briefs supporting the technical defense. Most recently, the report of the Western Conference of Attorneys' General (WAG) blandly refers to the defenses as if they are insignificant in the current dispute between tribes and states. The WAG report fails to recognize the harsh reality of the states' tactics: unless the courts grant relief or Congress provides an adequate remedy, the states have the means to frustrate tribes

from any attempt to enforce the good faith negotiation requirement. Even though courts are beginning to reject these defenses, several courts have accepted the states' arguments and a final judicial resolution may not be available for years. During that time, tribes are denied the opportunities Congress intended to preserve in the passage of IGRA.[4]

THE FOUNDING FATHERS CREATED PLENARY FEDERAL AUTHORITY OVER INDIAN AFFAIRS TO THE DELIBERATE EXCLUSION OF THE STATES; ACCORDINGLY, IGRA IS THE PROPER EXERCISE OF CONGRESS' CONSTITUTIONAL POWERS

The states' ongoing assault upon tribal gaming rights is a dishonest attempt to rewrite history. States assert in their political rhetoric and their legal briefs that the current dispute over tribal gaming is an issue of states' rights! Since the Constitutional Convention in 1787, states have never had inherent right to be involved in the regulation of tribal gaming. This fact was the crux of the Supreme Court's analysis in the landmark

[4] Tribal testimony before Congressional Committees bears this out:

> [M]any tribes are coerced into accepting unfair compacts that are not justified in light of the Cabazon decision codified in IGRA because they cannot afford the opportunity costs and the out-of-pocket costs associated with continued negotiation or litigation with state governments that defy IGRA. These are not "compacts," rather, they are the product of unjust state intrusion upon tribal sovereignty -- many tribes have no realistic alternative but to accept the state's terms.

Statement of John Kieffer, Vice-Chairman, Spokane Tribe of Indians, before the subcommittee on Indian Affairs, House Natural Resources Committee, April 2, 1993. Tribes have notified Congress that the states' strategy has been extremely effective:

> What is particularly galling about the State's strategy is its efforts encouraging tribes to remain at the negotiating table while remaining firm on its position regarding allowable games and their scope and at the same time aggressively pursuing the Eleventh Amendment argument. It appears once again the whipsaw mentality is being applied here. The State essentially says negotiate on our terms or you can turn around and face the AG's office in litigation that is going nowhere because we will take whatever steps as a State to prevent you from reaching the substantive merits of the litigation.

Statement of Matthew Dick, Spokesperson for the Confederated Tribes of the Colville Reservation, before the Senate Committee on Indian Affairs, United States Senate, March 18, 1992.

1987 decision, California v. Cabazon and Morongo Bands of Mission Indians, 480 U.S. 202, 215, (1987). From this fundamental and oft-repeated misconception by the states, faulty arguments have been put forward, first in the context of the Eleventh Amendment, and more recently in the context of the Tenth Amendment. The only "rights" of states to be involved in the regulation of tribal gaming are rights derived through congressional delegation in IGRA's compacting procedures, the very procedures that states now assert to be unconstitutional.

A brief review of the history of the Continental Congress wherein the foundation for federal/tribal/state relations was laid, establishes that the founding fathers intended that the tribes be entirely under federal power, to the exclusion of the states.

Relations with Indian tribes was a matter of intense debate by delegates to the Continental Congress. Many members believed that control over Indian affairs must be maintained by the federal government in light of the hostility that often existed between settlers and neighboring tribes. At the same time, however, many delegates resisted such centralized authority, fearful that such centralization would deprive the states of profitable trade with Indians. The result of the conflict was a compromise, with control of Indian relations divided between the central government and the states. See Robert N. Clinton and Margaret T. Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Maine Law Review 17, 23, (1979). Article IX, clause 4 of the Articles of Confederation, accordingly, provided:

> The United States in Congress assembled shall also have the sole and exclusive right and power of. . . regulating the trade and managing all

> affairs with the Indians, not members of any of the States, provided that the legislative right of any State within it own limits be not infringed or violated.

This divided authority proved to be unworkable, a fact that "haunted" the Continental Congress throughout its existence. Clinton and Hotopp, supra, at p. 23. Contemporary historical records reveal that the extent of Congress' Indian powers was a source of considerable confusion and was hotly debated throughout the confederated period. Oneida Indian Nation v. State of New York, 649 F. Supp. 420 (N.D.N.Y. 1986). Neither the degree to which the particular tribes or Indians "members of any of the states" nor the extent of "the legislate right of any State" over these indians could be determined with any certainty. As a result, "these limitations rendered the power of no practical value." Dick v. United States, 208 U.S. 340, 356 (1908).

Delegates to the subsequent Constitutional Convention of 1787, many of whom had served in the Continental Congress, were well acquainted with the conflicts inherent in the treatment of Indian affairs under the Articles of Confederation and were determined to resolve them. Although a number of different formulations were proposed and discussed by the delegates, the final language adopted in Article I, Section 8 of the Constitution was clear and straightforward: "The Congress shall have power...to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." By this language, the framers eliminated the provisos and exceptions reserving state authority over Indian affairs that plagued the experience under the Articles of Confederation. Clinton and Hotopp, supra at 29. In describing the language

of the Indian Commerce Clause, James Madison, one of the proponents of strong, centralized authority over Indian relations, noted that:

> [t]he regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory.

The Federalist, No. 42 (James Madison).

Thus, the framers of the Constitution clearly understood that the Indian Commerce Clause placed all authority for managing Indian affairs in the hands of the federal government, and at the same time, divested the states of any power in this area. According to the Supreme Court, "[w]ith the adoption of the Constitution, Indian relations became **the exclusive province of federal law.**" County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234, (1985) (emphasis added). This exclusivity is buttressed by the Supremacy Clause and the Senate's treaty-making powers. See Morton v. Mancari, 417 U.S. 535, 551-52, (1974); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 481 n.17, (1976); Felix S. Cohen, Handbook of Federal Indian Law (1982 ed.) at p. 211. The shackles upon the national government regarding Indian affairs during the confederation were discarded by adoption of the new Constitution. Oneida Indian Nation v. New York, 860 F.2d 1145, 1159 (2d Cir. 1988), cert. denied, 493 U.S. 871 (1989).

THE ELEVENTH AMENDMENT

The essence of the states' Eleventh Amendment defense is the assertion that Congress lacks the power to subject states to suits by tribes, even in the exercise of the

plenary federal power provided by the Indian Commerce Clause of the U.S. Constitution. Without a state's consent to suit, they argue, federal courts have no jurisdiction. This argument is directly contrary to relevant and recent U.S. Supreme Court precedent.

Under Pennsylvania v. Union Gas Company, 491 U.S. 1, (1989), Congress has power to abrogate state Eleventh Amendment immunity to give effect to legislation in an area of federal plenary authority, such as Indian Commerce. As explained in Union Gas, the states consented to article I plenary powers, including the power to abrogate state immunity, in the "plan of convention":

> ...[T]o the extent that the states gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising its authority, to render them liable. The states held liable under such a congressional enactment are thus not "unconsenting;" they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.

Union Gas, 491 U.S. at 19-20. Because IGRA is also an exercise of Congress' Article I Commerce Clause power, it follows that its abrogation of state sovereign immunity is fully constitutional.

The states cannot escape the Union Gas rule by arguing, as they have, that it cannot be applied to federal legislation under the Indian Commerce Clause. This argument ignores that congressional power in Indian commerce is much more sweeping than congressional authority over interstate commerce. Unlike interstate commerce, Congress shares no authority with the states over Indian commerce unless Congress so chooses. The Supreme Court has repeatedly interpreted Congress' Indian affairs power as "plenary" and exclusive.

Congress may choose to share some of its power, as it did in providing the states with authority to compact. Congress may also choose to subject the states to suit by tribes for abuse of the privilege they have been given. The sweep of the Indian Commerce Clause is more than sufficient to support the limited abrogation of state immunity accomplished in IGRA. Because IGRA is an exercise of Congress' Article I power, the Act's abrogation of state sovereign immunity is constitutionally sound.[5]

THE TENTH AMENDMENT

The states mistakenly argue that IGRA violates the Tenth Amendment reservation of non-delegated powers to the states in that it "forces" the states to regulate gaming activities on Indian lands. This argument ignores the reality of IGRA and its legislative history. Indeed, the states' assertion of such violation is ironic. Their limited role in the regulation of Indian gaming is a direct result of their own demands that they have such a privilege, following the Cabazon ruling in 1987. Congress granted their request and now they assert that it is an unconstitutional burden.

The reality is that nothing in IGRA compels the states to play any role or take any action in the regulation of tribal gaming. While it is true that states are obligated to enter into good faith compact negotiations, their failure to do so cannot impose any unwanted duty to regulate. At worst, if tribal suit succeeds, and if a state refuses to enter

[5] Even if the courts somehow found Congress lacks power to abrogate state sovereign immunity under the Indian Commerce Clause, IGRA's abrogation of immunity should still be valid on the alternative ground that Congress enacted IGRA under its Interstate Commerce powers over organized crime (25 U.S.C. § 2702(2)) or under its 14th Amendment powers to protect tribal rights against unwieldy exercises of state power.

into mediation or refuses to sign a compact selected by the mediator, then a state has abandoned its right to speak on that type of regulation that will govern tribal gaming within its borders. Instead, the Secretary of the Interior, in consultation with the Tribe, will promulgate federal procedures in lieu of a compact.

IF THE STATES PREVAIL IN THEIR CONSTITUTIONAL ATTACKS, IGRA FAILS AND THE 1987 CABAZON DECISION BECOMES THE LAW OF THE LAND

The tribes, and the tribes alone, are standing with Congress and attempting to play by the rules and make IGRA work. If the states ultimately prevail, they will cause the entire regulatory scheme of IGRA to unravel. The courts will address the question of what is left of IGRA after the provision for compacts are removed as unconstitutional. Tribes will have a right without a remedy. If what is left over is such a substantial departure from Congress' original intentions, courts will necessarily rule that IGRA, in its entirety, is unconstitutional. Certainly Congress did not intend to allow states to prevent tribes entirely from conducting viable class III gaming activities merely by refusing to consent to federal court jurisdiction. Senator Inouye made this very clear in his March 19 address to tribal leaders:

> I believe that if we had known at the time we were considering the bill -- if we had known that this proposal of tribal/state compacts that came from the states and was strongly supported by the states, would later be rendered virtually meaningless by the actions of those states which have sought to avoid entering into compacts by asserting the Tenth and Eleventh Amendments to defeat federal court jurisdiction, we would not have gone down this path.

Statement of Senator Inouye to Tribal Leaders, March 19, 1993.

CONCLUSION

The states are reneging on the deal that they proposed and Congress accepted in 1988. The states now unjustly and wrongly assert that IGRA violates both the Tenth and Eleventh Amendments to the U.S. Constitution. Although the tribes have the better legal arguments deeply rooted in the historical relationship between tribes and the federal government, states had initial success in their constitutional attacks on IGRA's compacting procedures and even where they lose on the issue, have succeeded in causing lengthy delay and in coercing tribes into accepting unwarranted compacts. The states have abused the privilege that Congress provided them in IGRA. The tribes are playing by IGRA's rules. If the states cannot play by those same rules, then Congress should remove those states from the process and return to the historical tribal/federal relationship, to the exclusion of the states. We submit that if the states persist in their subversive stance, it is not too late for Congress to choose another path to protect the rights confirmed to tribes as an essential part of IGRA's compromise.

Mr. RICHARDSON. Thank you, Mr. Straus.
Mr. Feldman.

STATEMENT OF GLENN M. FELDMAN

Mr. FELDMAN. Chairman Richardson, Representative Thomas, I appreciate the opportunity to testify here today.

Among the most persistent myths surrounding the Indian Gaming Regulatory Act is the notion that if a State authorizes one form of class III gaming, Indian tribes in that State are automatically entitled to negotiate compacts for all forms of class III gaming. This misconception, commonly referred to as the "any means all" standard, is being fostered by those who either do not understand the Indian Gaming Regulatory Act or whose political agenda is served by promoting misinformation.

For example, within the last year this argument has been advanced by the National Association of Attorneys General and the National Governors Association. More recently, Governor Roy Roemer of Colorado, the Chairman of the National Governors Association, sought to expand this contention in testimony before this subcommittee on April 2 of this year.

In fact, there is no "any means all" standard in the Indian Gaming Regulatory Act. Neither the language of the act nor its legislative history support such a view, nor have any of the court cases interpreting the act applied such a standard. Rather, this myth is being perpetuated by State officials who historically have been unwilling to accept the concept of tribal sovereignty and self-government.

When properly analyzed, it is clear that the so-called "any means all" standard is nothing more than a thinly veiled effort to bring tribal gaming activities under complete State control. Congress rejected this approach in 1988, and it should be rejected today.

For Congress to now entertain amendments to the Indian Gaming Regulatory Act based on fictional considerations would not only undermine the delicately balanced compromise underlying the Act, but would also jeopardize the Act's goals of tribal economic development, reservation, self-sufficiency, and strong tribal governments.

In order to put this issue into perspective, it is necessary to briefly review the Supreme Court's decision in *California* v. *Cabazon Band of Mission Indians*, the case that led to the enactment of the Act. In that case, the Supreme Court rejected the State's jurisdictional argument and held that California had no authority to regulate bingo and card games on the Cabazon and Morongo reservations.

In reaching this decision, the court relied on the well-recognized civil regulatory criminal prohibitory dichotomy stating that if the intent of a State law is generally to prohibit certain conduct, it falls within the area of criminal jurisdiction. But if a State generally permits the conduct at issue subject to regulation, it must be classified as civil regulatory.

"The shorthand test"—and I am quoting here—"the shorthand test is whether the conduct at issue violates the State's public policy. The determination of that policy is made by looking beyond any single statutory provision and examining as a factual matter what the State actually permits as a whole."

The *Cabazon* case thus conducted a careful fact-based analysis of California's gambling laws. After doing so, the court observed California does not prohibit all forms of gambling; California itself operates a State lottery and daily encourages its citizens to participate in this State-run gambling. The court then went on to note that the State also permits bingo, pari-mutuel wagering, and a variety of card games.

The court concluded by noting that in light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its State lottery, "We must conclude that California regulates rather than prohibits gambling in general and bingo in particular."

It was the same public policy-based standard from *Cabazon* that Congress adopted to determine the permissible scope of class III gaming under the Indian Gaming Regulatory Act. The standard under the Act is set forth at Section 2710(d)(1)(b), where the Act states that "class III gaming activities shall be lawful on Indian lands only if such activities are located in a State that permits such gaming for any purpose by any person, organization or entity."

The standard against which gaming by tribal governments must be measured is, therefore, a simple outgrowth of *Cabazon.* Tribes are entitled to negotiate for whatever the State permits, not merely as a matter of literal expression in a State's statutes, but as a matter of true public policy.

Mr. Chairman, in my prepared statement I have got several pages of fairly detailed analysis of the four Federal court cases that have addressed this issue. I am going to skip over the detailed analysis, but I would like to simply note that in each case—and there is a common thread running through each one of them—in each case the courts looked at what the State actually permits as a matter of State public policy. In each of the cases, the courts analyze those aspects of State law that relate to gaming, and in each of the cases it found that the States, despite the protestations of the States that, Oh, no, we don't permit gaming, gaming is against our public policy. In fact, they found that in each of the States substantial amounts of gaming activities were authorized under State law. And as a result, in each case the courts found that the tribes were entitled to negotiate compacts for a range of class III gaming activities specifically because the States themselves allowed those activities within their own borders.

Mr. Chairman, let me conclude with these thoughts. Those who promote the fictional "any means all" interpretation of the act have a clear political agenda. They want Congress to reject the *Cabazon* decision and to amend the Act to bring all tribal gaming under complete State jurisdiction and control.

Clearly, making tribal gaming subject to all of the same restrictions and regulations as apply to State-sponsored gaming is wholly inconsistent with *Cabazon.* When Congress enacted the Act in 1988, it considered and rejected the option of bringing tribal class III gaming activities under State jurisdiction.

In so doing, Congress recognized that to make tribal gaming subject to total State control would be inconsistent with the basic principles of Federal Indian law and would necessarily undermine Fed-

eral policies promoting tribal self-government. Instead, Congress adopted the approach suggested by the States at that time and opposed by most tribes that class III gaming should be regulated through negotiated tribal State compacts.

Under the compacting process, the extent of State and tribal regulation was to be negotiated between two co-equal sovereigns, and Congress made it clear that it was rejecting any suggestion that tribal gaming should be automatically subjected to complete State jurisdiction.

For Congress to now amend IGRA to place tribal gaming under complete State jurisdiction would not only overturn the tribes' hard fought victory in *Cabazon,* but would also be wholly inconsistent with the concept of negotiating tribal State compacts.

Former Chairman Morris Udall called the compacting process the core of the compromise on which the IGRA was based. Needless to say, the tribes cannot and will not agree to this wholesale destruction of their economic future based on nothing more than a fictional argument advanced by those who have never accepted the basic concept of tribal sovereignty.

Thank you very much.

[Prepared statement of Mr. Feldman follows:]

TESTIMONY OF
GLENN M. FELDMAN

BEFORE THE SUBCOMMITTEE ON
NATIVE AMERICAN AFFAIRS,
COMMITTEE ON NATURAL RESOURCES
U. S. HOUSE OF REPRESENTATIVES

OVERSIGHT HEARING ON THE
IMPLEMENTATION OF THE INDIAN
GAMING REGULATORY ACT

June 7, 1993

Chairman Richardson and Members of the Subcommittee:

My name is Glenn Feldman. I am a lawyer from Phoenix, Arizona, and I appreciate the opportunity to testify here today on the implementation of the Indian Gaming Regulatory Act.

By way of background, for the past 14 years my practice has been devoted almost exclusively to federal Indian law. I currently represent tribes in Arizona, California, Kansas and Oklahoma. I have been actively involved with the legal issues surrounding gaming on Indian reservations since 1980, and in 1986 I had the opportunity to argue the Cabazon case before the United States Supreme Court. Since that time, I have negotiated several tribal-state compacts and I am presently involved in litigation over a variety of Indian gaming issues, both here in Washington, D.C. and in a number of states.

The purpose of my testimony today is to respond to the contention that has been presented to this Subcommittee in previous hearings that under the Indian Gaming Regulatory Act, if a State permits any form of class III gaming, Indian tribes are automatically entitled to engage in all forms of class III gaming. Before doing so, however, I would like the record to reflect that my prepared testimony today is largely based upon a paper that I co-authored last month with Jerome Levine, a lawyer from Los Angeles, California. I say this because I want Jerry to share in the credit--or the blame--for what I am about to say.

Among the most persistent myths surrounding the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. (the "Act" or "IGRA") is the notion that if a State authorizes one form of class III gaming, Indian tribes in that State are automatically entitled to negotiate compacts for all forms of class III gaming. This misconception -- commonly referred to as the "any means all" standard -- is being fostered by those who either do not understand IGRA or whose political agenda is served by promoting misinformation. For example, in a resolution adopted by the National Association of Attorneys General at its Summer Meeting on July 8-11, 1992, the Association stated that:

> courts have interpreted the language of the Act to suggest that whenever a State permits some Class III gaming activities, the tribes are entitled to all Class III gaming activities, despite the absolute criminal prohibition on various of these gaming activities in certain States. . .

Similarly, in a position paper on Indian gaming adopted by the National Governors Association on February 2, 1993, the Governors stated their view that:

> It must be made clear that tribes can operate gaming of the same types and subject to the same restrictions that apply to all other gaming in the state. In particular, it should be clarified that a state is not obligated to negotiate a compact to allow a tribe to operate any and all forms of Class III gaming simply because a state allows one form of Class III gaming. Only those games expressly authorized by state law should be permitted.

More recently, Governor Roy Roemer of Colorado, the Chairman of the National Governors' Association, sought to expand this contention. In testimony before this Subcommittee on April 2, 1993, Governor Roemer testified:

> Does the playing of one Class III game require a state to negotiate a compact for all Class III games? We think not and believe this result was not intended by the legislation. The "any means all" standard applied in several states following the decision in the Wisconsin case has made it extremely difficult to effectively negotiate state-tribal compacts, We believe the statute should make clear that tribes can operate gaming of the same types and subject to the same restrictions that apply to all other gaming in each state.

In fact, as discussed below, there is no "any means all" standard in IGRA. Neither the language of the Act nor its legislative history support such a view. Nor have any of the court cases interpreting IGRA applied such a standard. Rather, this myth is being perpetuated by state officials who historically have been unwilling to accept the concepts of tribal sovereignty and self-government, and whose opposition to those principles has taken on new virulence of late.

When properly analyzed, it is clear that the so-called "any means all" argument is nothing more than a thinly veiled effort to bring tribal gaming activities under complete state control. Congress rejected this approach in 1988 when it enacted IGRA and it should also be rejected today. As described by then-Chairman Morris Udall, IGRA was a "delicately balanced compromise" that carefully weighed the competing interests of the tribes and the states. It was enacted after nearly four years of debate and compromise by tribes and states alike. For Congress to now entertain amendments to IGRA based on fictional considerations would not only undermine that balance, but would also jeopardize IGRA's goals of tribal economic development, reservation self-sufficiency and strong tribal governments.

TO DETERMINE THE PERMISSIBLE SCOPE OF CLASS III GAMING, IGRA REQUIRES A CAREFUL REVIEW OF THE STATE'S OVERALL PUBLIC POLICY TOWARDS GAMBLING AND DOES NOT FOCUS ON ANY SINGLE FORM OF CLASS III GAMING.

In order to put this issue into perspective, it is necessary to briefly review the Supreme Court's decision in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), the case that led to the enactment of IGRA., In Cabazon, two tribes challenged an attempt by the State to prohibit Indian tribal governments from operating bingo and poker games on their reservations under rules that were different from those applicable to similar gaming off the reservation, where both bingo and poker were widely played. The Supreme Court rejected the State's position, holding that California had no authority to regulate these games on the reservation. In reaching its conclusion, the Court relied on the well-established "civil/regulatory--criminal/prohibitory" dichotomy: "if the intent of a state law is generally to prohibit certain conduct, it falls within . . . criminal jurisdiction, but if the state law generally permits the conduct at issue subject to regulation, it must be classified as civil/regulatory . . . . The shorthand test is whether the conduct at issue violates the State's public policy." 480 U.S. at 209 (emphasis added). In other words, despite the fact that a State's statutes might profess to restrict broad forms of gambling, a tribe's own regulation of such gaming on the reservation for governmental purposes must be respected unless its activities not only conflict with the State's expressed restrictions, but also with the State's actual public policy in that area. Unless that policy reflects an absolute criminal prohibition with respect to the gaming activities in question, the State's statutory restrictions must at best be deemed to be regulatory rather than prohibitory.

The determination of that policy is made by looking beyond any single statutory prohibition and examining as a factual matter what the State actually permits as a whole. The Cabazon Court thus conducted a careful fact-based analysis of California's gambling laws. The Court determined that the State's overall gaming policy as applied to bingo and poker was not, in fact, an expression of a fundamental aversion to such activities, but was merely civil/regulatory in nature. The State's statutory restrictions on such conduct therefore could not be imposed upon the tribes' own governmental gaming activities. The Court observed:

> California does not prohibit all forms of gambling. California itself operates a state lottery . . . and daily encourages its citizens to participate in this state-run gambling. California also permits parimutuel horse-race betting. Although certain enumerated gambling games are prohibited under Cal.Penal Code Ann.

> § 330, games not enumerated, including the card games played in the Cabazon card club, are permissible. The Tribes assert that more than 400 card rooms similar to the Cabazon card club flourish in California, and the State does not dispute this fact. Also, as the Court of Appeals noted, bingo is legally sponsored by many different organizations and is widely played in California. There is no effort to forbid the playing of bingo by any member of the public over the age of 18 . . . . In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.

480 U.S. at 210-211 (citations omitted, emphasis added).

It was the same public policy based standard from Cabazon that Congress adopted to determine the permissible scope of class III gaming under IGRA. As clearly set forth in the congressional findings supporting IGRA:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2701(5)(emphasis added). The standard for the permissible scope of class III gaming activities under the Act is set forth in similar terms:

> Class III gaming activities shall be lawful on Indian lands only if such activities are . . . located in a State that permits such gaming for any purpose by any person, organization or entity.

25 U.S.C. § 2710(d)(1)(B).

The standard against which gaming by tribal governments must be measured is therefore a simple outgrowth of Cabazon: whatever the State "permits," not merely as a matter of literal expression in a State's statutes, but as a matter of true public policy. Neither the Supreme Court nor Congress intended that a State could control tribal activities by a mere stroke of the pen; the State had to apply a bona fide public policy of prohibition on its own and its' citizens conduct if it expected similar

restrictions to be placed on tribal governments within its borders.

> THE CASES INTERPRETING IGRA HAVE ALL APPLIED THIS BROAD, PUBLIC POLICY BASED STANDARD TO DETERMINE THE PERMISSIBLE SCOPE OF GAMING.

The first case to examine this aspect of IGRA was United States v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358 (8th Cir. 1990). The issue there was whether a tribally operated blackjack facility which operated games that exceeded State betting limits had lost a grandfather exemption it enjoyed under IGRA. That provision allowed that the grandfathered activities, even if otherwise "class III" as blackjack normally would be regarded, could be deemed to be a "class II" activity if games of a similar nature and scope were played before IGRA was enacted and fell under the Act's class II test that the activity be located within a State that "permits such gaming for any purpose by any person, organization or entity." 25 U.S.C. § 2710(b)(1)(A). The lower court concluded that the tribe had not met the "nature and scope" requirements because it had increased the number of tables and hours of operation subsequent to the grandfathered period of operation, and alternatively that the games could not qualify in any event because the betting limits were higher than permitted under State law. After holding that the increase in tables and hours were not disqualifying factors under the grandfather provisions, the court of appeals turned to the question of whether the games in question were "permitted" in the State of South Dakota under IGRA. The government argued that the "permits such gaming" language expressed congressional intent that state law be relied upon to supply substantive regulations on gaming conducted by tribal governments; that this merely constituted "an instance of Congress assimilating state law by reference." 897 F.2d at 364. The court of appeals disagreed:

> Contrary to the district court's holding, we believe that the legislative history [of IGRA] reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity.

Id. at 365 (emphasis added).

The court determined from an extensive analysis of the legislative history that IGRA reflected the traditional historical relationship and delicate balance among the United States, tribes, and the States that was articulated in Cabazon. In determining what would be "permitted" under State law, "Congress adopted a modified version of the Cabazon test:

> Thus, as a court, our task is to assess whether South Dakota's gaming law is prohibitory or regulatory in nature in order to determine the effect, if any, of State law on the Tribe's blackjack operations. This prohibitory/-regulatory distinction is consistent with congressional perceptions of the relationship between Indian tribes, federal government, and state government. As explained by Senator Evans when [IGRA] was considered, the Act must be construed in light of the following principle:
>
> When [Congress] has chosen to restrict the reserved sovereign rights of tribes, the courts have ruled that such abrogation of tribal rights must have been done expressly and unambiguously.
>
> ... Therefore, if tribal rights are not explicitly abrogated in the language of this bill, no such restrictions should be construed. This act should not be construed as a departure from established principles of the legal relationship between the tribes and the United States. Instead, this law should be considered within the line of developed case law extending over a century and a half by the Supreme Court, including the basic principles set forth in the Cabazon decision. 134 Cong. Rec. S12654 (daily ed. Sept.15, 1988); see also S. Rep. No.100-446, supra, at 5.

Id. at 366.

The court then turned to the crux of the issue: a factual determination of what South Dakota actually permitted as a matter of policy. Noting the wide variety of gaming permitted under South Dakota law, the court concluded that South Dakota's gaming laws were regulatory in nature and that the Tribe's playing of blackjack under regulations which differed from the State's was not outside of what was "permitted" in that State. Id. at 367.

Thus in Sisseton-Wahpeton, as in Cabazon, the court ultimately looked to the facts in that particular situation to reach its conclusion. No simplistic formula, such as the so-called "any means all" standard, was employed to determine what would be "permitted" conduct for an Indian tribe, nor would the use of such a mechanical formula be appropriate. The court recognized that IGRA is carved out of doctrine which represents over 150 years of Federal Indian law and policy. Only in that context, and under the specific facts of the South Dakota statutory scheme, could a determination of

what is permitted in that State be made. After making that kind of an examination, the court found that South Dakota was so involved with gaming overall that tribal deviations from the State's specific rules could not be found to violate the State's public policy.

Soon after Sisseton-Wahpeton was decided the issue of what is "permitted" under State law within the meaning of IGRA arose in a clear class III context. In Mashantucket Pequot Tribe v. State of Connecticut, 913 F.2d 1024 (2nd Cir. 1990), the tribe brought an action to compel the State to negotiate a tribal-state compact. The tribe contended that because the State authorized extensive casino type gaming, albeit in the context of charitable "Las Vegas Nights," the State clearly permitted that type of activity as a matter of public policy; i.e, the State could not permit its citizens to gamble at crap tables and roulette wheels for "worthy purposes" but at the same time contend that as a matter of policy such conduct was deeply offensive. The State refused to negotiate with the tribe. In holding that the State was required to submit to the compacting process over such gaming, the court determined that the State's statutory scheme did not prohibit, as a matter of public policy, the kind of gaming proposed by the Tribe. Those forms of gaming were therefore open to negotiation, since to rule otherwise would render the compacting process "a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible." 913 F.2d at 1030.

The case most often cited as an "example" of the "any means all" standard, and consequently the most frequently misconstrued, is Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin, 770 F.Supp. 480 (W.D. Wis. 1991). The Lac du Flambeau tribe contended the State of Wisconsin was acting in bad faith by refusing to bargain over the inclusion of class III casino gaming in its compact negotiations with the State. The court concluded that the State was required to negotiate those activities because they were "permitted" under Wisconsin law within the meaning of IGRA.

In reaching its conclusion, the court noted that the State's literal reading of the word "permits" under IGRA ignored the Supreme Court's holding in Cabazon "on which Congress relied in drafting [IGRA]." 770 F.Supp. at 485. Echoing the finding in Mashantucket Pequot, the court held that the policy aspect of what is "permitted" by State law under IGRA applies equally to class III as to class II.

> "In light of the legislative history and the congressional findings, I conclude that the initial question in determining whether Wisconsin "permits" the gaming activities at issue is not whether the state has given express approval to the playing of a particular game, but whether Wisconsin's public policy

> toward class III gaming is prohibitory or regulatory."

Id. at 486. Again, the court did not rely on a simple "any means all" test or any other formalistic approach. In order to determine what is "permitted" under State law one must turn to the particular laws and practices in that State. In Lac du Flambeau, the court conducted a lengthy analysis of the history of gaming in the State of Wisconsin, noting that despite statutory restrictions on gaming, the movement away from extensive prohibition to the creation of numerous exceptions, both in the State constitution and otherwise, compelled a factual conclusion that Wisconsin had a state policy toward gaming that is now regulatory rather than prohibitory.

> It was not Congress's intent that the states would be able to impose their gaming regulatory schemes on the tribes. The Act's drafters intended to leave it to the sovereign state and tribal governments to negotiate the specific gaming activities involving prize, chance and consideration that each tribe will offer under the terms of its tribal - state compact.

Id. at 487.

Most recently, in Yavapai-Prescott Indian Tribe v. State of Arizona, following a reference to a mediator to decide the issue of what had to be negotiated (i.e., what was "permitted"), the mediator (retired Arizona Chief Justice Frank X. Gordon, Jr.) made extensive factual findings about the kind of gaming actually occurring under the law of Arizona. These included the State spending 8 million dollars a year to advertise lottery games and to encourage the public -- its citizens -- to take that gamble. He further noted that the State's instant scratch games were the virtual equivalent of mechanical or electronic slot machines. The State is also heavily involved in pari-mutual horse and dog race betting, not only at tracks, but at numerous bars and other locations statewide. The State also permits many forms of "social" as opposed to commercial gaming, and unregulated "charity nights," in which patrons can play blackjack, poker, dice, roulette and slot machines are prevalent.

> "Arizona has long since passed the time when it prohibited gambling. It now not only allows it, but encourages it... It seems cruel to allow non-Indian charities in Arizona to use casino gambling to raise substantial sums of money for such purposes as providing scholarships for educational needs; raising money for medical services and supplies for the sick, elderly and the disabled, and yet to deny the Indian tribes in Arizona that same

opportunity for the very same purpose."

Significantly, Justice Gordon felt compelled to point out that he did not "base [his] opinion that Class III gaming already is the public policy of Arizona merely on the allowance of charity casino nights alone."

> Permitting horse and dog racing and parimutuel betting on those events took Arizona on the first step into Class III gaming. Then the biggest step was taken when the voters of Arizona decided that Arizona should run a state sponsored lottery. It was made clear then that the citizens of Arizona wanted Class III gambling.

Once again, and consistent with the cases cited above, no simplistic formula was applied. No singular instance of a particular game being played under State law was relied upon to justify broader activity by the tribes. The existence of a single form of class III gaming was not taken to mean that "all" forms of class III gaming must be negotiated into a compact. No court has ever so held. Instead, in Yavapai-Prescott and its predecessors the court looked at and analyzed the actual activity taking place lawfully within the State. The court then concluded that under the facts of that situation, certain forms of class III gaming should be the subject of good faith compact negotiations.

THOSE WHO PROMOTE THE "ANY MEANS ALL" MYTH REALLY WANT CONGRESS TO OVERTURN THE CABAZON DECISION AND PLACE ALL TRIBAL GAMING UNDER COMPLETE STATE JURISDICTION.

Those who promote the fictional "any means all" interpretation of IGRA have a clear political agenda; they want Congress to reject the Cabazon decision and to amend IGRA to bring all tribal gaming under complete State jurisdiction and control. This agenda is evident from their own words. As Governor Roemer stated in his recent testimony before this Subcommittee:

> We believe the statute should make clear that tribes can operate gaming of the same type and subject to the same restrictions that apply to all other gaming in each State.

Clearly, making tribal gaming subject to all of the same restrictions and regulations as apply to state sponsored gaming is wholly inconsistent with the Cabazon decision. The whole point of that case was that if a State permits gaming, tribes within that

State, as self-governing entities, are entitled to permit such gaming and to regulate it under tribal standards, which may differ from State standards. Under Cabazon, the tribes were not subject to the $250.00 prize limit that the State of California imposed on state -licensed bingo games.

When Congress enacted IGRA in 1988, it considered and rejected the option of bringing tribal class III gaming activities under complete State jurisdiction, as the Governors now propose. In so doing, Congress recognized that to make tribal gaming subject to total State control would be inconsistent with basic principles of federal Indian law and would necessarily undermine federal policies promoting tribal self-government. Instead, Congress adopted the approach suggested by the States at that time - and opposed by most tribes that - Class III gaming should be regulated through negotiated tribal-state compacts. Under the compacting process the extent of state or tribal regulation was to be negotiated between two coequal sovereigns, and Congress made it clear that it was rejecting any suggestion that tribal gaming should be automatically subjected to complete State jurisdiction:

> A compact may allocate most of the jurisdictional responsibility to the tribe, to the state, or to any variation in between. The committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands.

S. Rep. No. 446, reprinted at 1988 U.S. Code Cong. & Admin. News 3076, 3084. For Congress to now amend IGRA to place tribal gaming under complete State jurisdiction would not only overturn the tribes' hard fought victory in Cabazon, but also would be wholly inconsistent with the concept of negotiated tribal-state compacts. As the Second Circuit Court of Appeals correctly noted in the Mashantucket Pequot case:

> Under the State's approach, on the contrary, even when a State does not prohibit Class III gaming as a matter of criminal law and public policy, an Indian Tribe could nonetheless conduct such gaming only in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming. The compact process that Congress established as the centerpiece of the IGRA's regulation of Class III gaming would thus become a dead letter; there would be nothing to negotiate and no meaningful compact would be possible.

913 F. 2d at 1030-31 (emphasis added). Thus, what the Governors and their allies are really proposing is not only the overruling of Cabazon, but the undermining of the negotiated compact process

itself; a process that former Chairman Morris Udall called "the core of the compromise" on which IGRA was based. Needless to say, the tribes cannot and will not agree to this wholesale destruction of their rights based on nothing more than a fictional argument advanced by those who have never accepted the basic concept of tribal sovereignty.

Mr. Chairman, that concludes my prepared testimony. I would be happy to respond to any questions that you or the other Subcommittee members may have.

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Mr. RICHARDSON. Mr. Feldman, let me ask you the question about the Wisconsin case. I am talking about the *Lac du Flambeau* decision which basically is cited as a seminal "any means all" case.

How did the court interpret that law, and what is the value of this law outside of Wisconsin as a precedent?

Mr. FELDMAN. Well, that is of course the case that most people point to as the one that indicates an "any means all" standard. I went back and read the case last night, something that we ought to do occasionally when we discuss things like that, and to me it is absolutely clear that the judge was not saying that because the State of Wisconsin has a lottery alone that the tribes were entitled to negotiate a broader range of class III gaming.

The State of Wisconsin—the court went through a fairly detailed analysis of the history of Wisconsin's gaming laws and found that while at one point the State did prohibit all forms of gaming, in fact in recent years the State has amended both its constitution and its statutes to authorize a fairly broad range of gaming activities. Specifically, the State had adopted a constitutional amendment that authorized the State lottery, and for a hundred years, for a hundred years, the State of Wisconsin as a matter of State law had held that the term lottery as used in the State constitution meant any form of gaming activity involving prize, chance, and consideration.

So the court in *Lac du Flambeau,* using State law analysis to some extent, concluded that when the voters of Wisconsin amended that constitution and permitted a State lottery, it was in fact permitting the State of Wisconsin to conduct any form of class III gaming that involved prize, chance and consideration, and it was on that basis that the court ruled that the tribes were entitled to negotiate a fairly broad range of activities.

Mr. RICHARDSON. Now, has the Wisconsin law been followed elsewhere? In other words, what would stop the State legislature from simply passing a law prohibiting or limiting forms of gaming? Do you think this would be the State's remedy to the "any means all" clause?

Mr. FELDMAN. Well, the State certainly has some ability to do that, but they can't have it both ways. They can't be hypocritical about it. They can't authorize those forms of games that they want and at the same time try to prohibit tribal gaming.

To some extent that is exactly what has happened in my State of Arizona recently where in response to a mediator's decision authorizing class III compacts or authorizing class III gaming by certain tribes, the State, the governor brought the State legislature into special session specifically for that purpose, to try to amend State law to do what he thought would be to prohibit tribal class III gaming. Now, it has turned out to be a political disaster for the governor, and in fact the legislature is meeting this morning as we speak to undo what the governor has done.

So to some extent if a State wants to adopt a policy that says, we don't want gaming within our borders, it can do that, and it has a right to do that by amending its constitution.

Mr. RICHARDSON. In other words, a State can move ahead and better define the games it allows and prohibits in any State statute, right?

Mr. FELDMAN. It can do that within some borders, but again it can't be hypocritical. It can't permit the games that it wants and try to prohibit the games that the tribes want.

Mr. RICHARDSON. Now on that, to Counselor Williams, States have argued that simply because a State allows casino nights for charitable organizations that it shouldn't open the door to Indian tribes in the State to conduct these same games. How does this reasoning comport with the *Cabazon* case and some of the progeny cases from *Cabazon*?

Ms. WILLIAMS. Mr. Chairman, the *Cabazon* case made distinctions between gaming that is absolutely prohibited by anyone anywhere anytime under State law; that to the extent that games are permitted by anyone anywhere, IGRA contemplates that those kinds of games, borrowing from the *Cabazon* prohibitory regulatory distinction, are for gaming purposes only. Congress contemplated that if there is a game permitted by anyone anywhere in the State, then those types of games are subject to the good-faith negotiations required by class III compacting.

In a State where there is a casino night held once a year, to cite a hypothetical—in some cases, not so hypothetical—where full-scale casino gambling is allowed one night a year, Congress contemplated that the State and the tribe would negotiate on the terms under which the tribes could conduct that type of gaming year-round. That is what is contemplated by IGRA. Congress left it to the States and the tribes to work those kinds of deals out.

On the tribal side, there is also an obligation to negotiate and recognize important governmental State interests. In those rare, extreme situations where it is casino night once a year, then the State and the tribe really ought to get together and try to find some sort of reasonable compromise in those instances.

But as a matter of Federal law, those kinds of games are civil regulatory within the meaning of the *Cabazon* distinction, and therefore those types of games, all of which are allowed in casino nights, are on the table for negotiation purposes.

Mr. RICHARDSON. At the first hearing we held in the Ways and Means Committee room, some of the States came before this committee and used the words "level playing field." They basically said that Indian gaming activities should conform to all State regulations including pot sizes, wager limits, hours of operation.

What are your views on this position vis-a-vis existing law?

Ms. WILLIAMS. Existing law in IGRA is that to the extent that—again, existing law in IGRA relied on the distinction announced in the *Cabazon* decision between laws that are criminal prohibitory, in other words, all those types of gaming are off the table and civil regulatory. That is, those types of games that the States permit someone to do somewhere any time.

Under *Cabazon*, to the extent that the law was civil regulatory, those tribal games could not be subject to State limits on pots, wagers, et cetera. That is the *Cabazon* rule that Congress recognized in IGRA.

In answer to the question, questions like pot limits, wager limits are suitable items for negotiation, but Congress ought not weigh in and establish rules along those lines. Those are precisely the mat-

ters subject to tribal-State negotiation contemplated by existing law.

Mr. RICHARDSON. Are there any other areas of Federal Indian law where tribal governments have been subjected to State regulation?

Ms. WILLIAMS. There are some areas in which Congress has provided a scheme such as Public Law 83–280 for States to acquire civil adjudicatory and criminal jurisdiction over Indian reservations. There are some instances in which now the courts have interpreted that States have a role, in liquor regulation, for example, on Indian reservations. There are some other instances in which Congress has contemplated some sort of State rule during periods in which Congress contemplated the assimilation of Indian tribes.

Today, that is not Congress's policy. The policy is to preserve tribal self-government, as was the initial relationship established in the early decisions of the Supreme Court in the so-called "Marshal Trilogy," where Congress took upon itself to recognize tribes not only as land owners but as sovereigns with exclusive jurisdiction in their territory. That is existing law, and any attempt by Congress to expand whatever existing role there is for States on Indian reservations is flatly counterproductive to Congress' self-government and economic development mandates.

Mr. RICHARDSON. Mr. Straus, some of the critics in testimony of the current Act urging us to change it have said that there is not enough regulation in the Indian Gaming Act. Give me an assessment of your view on this. Say, give me a rating for the job that the Interior Department does, the tribes themselves, the FBI, the various entities that are involved in "regulation." And assuming that you don't agree that there is not enough regulation, give me some practical options that we can deal with this specter that is out there that there is no regulation, it is too loose, that organized crime can get in very easily.

Mr. STRAUS. I think it is a phony charge. I think there has been extensive regulation. The key here is that under the compact process, the States and the tribes can negotiate for the kind of regulation that will be effective. It will be a shared regulation between the tribes and the States. That was what the States wanted, and in States like Minnesota and in Wisconsin where there have been extensive compacts, there is a very complex system of regulation put in place.

The States who are charging that there is not enough regulation are the same ones that are blocking the compacts. There is a remedy for that either through increased Federal regulation, and there have been proposals for an expanded role for the National Indian Gaming Commission, and that may be appropriate if a State does not want to participate. But there is extensive regulation. Certainly not as much as there is in Nevada and New Jersey, but there isn't as much need as there is in those States because of the history pointed out by Mr. Alexander. Indian tribes don't start by being in bed with organized crime. There is no proof of any credible kind that that is a major problem.

If the States are really concerned about it, they should negotiate in good faith with the tribes. If they do negotiate in good faith, something they haven't really tried to do, with few exceptions, then

Congress could judge the results and see whether there is still a problem. Right now we don't know except that there is the possibility of extensive State regulation as part of the price for having a compact.

Mr. RICHARDSON. Now, Mr. Straus, regarding the tenth and eleventh Amendments, in your view, what is the original purpose of the tenth Amendment and does the Gaming Act require the States to regulate Indian gaming?

Mr. STRAUS. The purpose of the tenth Amendment was to make clear that powers not delegated to the Federal Government were reserved to the States, to the people of the States. That is a fundamental part of our jurisprudence. But the Indian Gaming Regulatory Act does not require the States to do anything. If they don't want to participate, they simply can stand back and let the Secretary of the Interior do it.

Mr. RICHARDSON. What would happen if under the tenth and eleventh Amendments the States prevail on the challenges to the Gaming Act and the entire Act is declared unconstitutional?

Mr. STRAUS. I think the result would be far worse than just curtailment of Indian gaming. What is brought into question in those challenges is part of the fundamental system of Indian affairs that has been followed since the beginning of the Republic, since the Marshal Trilogy made it clear. It would imply a much expanded role for the States because it would mean that Congress's plenary power is no longer plenary, that Congress could not provide this kind of remedy in cases where States have violated tribal rights.

In terms of what would happen in gaming, if those sections are called unconstitutional, then my opinion is that the entire Act is unconstitutional because these are central provisions in the statute. We would go back to the *Cabazon* case, and I think given what has happened, we would have chaos because you would have people in various States in various stages and no one being sure just what the law was. We would have a great deal of litigation and a great deal of trouble.

Indian tribes are not going to accept the destruction of this. It is fundamental to them. It is the only thing that has come along in 200 years that has made a difference economically, and they desperately need it.

Mr. RICHARDSON. Susan, do you want to answer that question, too?

Ms. WILLIAMS. I agree with Mr. Straus that the tenth and eleventh, if those were declared unconstitutional by the courts, then the entire Act would be eviscerated because that is the means by which tribes enforce class III compact negotiations, the very deal that States and tribes agreed to not too long ago.

There may be ways—I haven't given it much thought, but there may be ways to cure the tenth and eleventh problem through such mechanisms as authorizing the United States to bring the lawsuit in those instances, and that should be explored carefully by the committee.

Mr. RICHARDSON. Back to you, Susan. Can the courts say that under the Interstate Commerce Clause, Congress could confer Federal jurisdiction but under the Indian Commerce Clause, Congress cannot?

Ms. WILLIAMS. Well, there is some reasoning in some recent court decisions regarding the scope of tribes' sovereign immunity, indicating that when Congress authorized tribes to bring suits on their own behalf that carved out of that were suits against States because of some sort of agreement among States and the plan in the Constitution that they could sue each other.

I think those principles really are irrelevant to the core principles of Federalism that are long-standing in this country; that is that Congress has plenary power over Indian affairs. That was recognized in the Constitution, and I believe that States agreed to that plan whereby Congress would be supreme in the regulation of Indian affairs, including determining the appropriate role, if any, of the State in Indian reservation affairs.

We would point out that it was Congress that allowed States to play a role in Indian affairs beginning with the Dawes Allotment Act of 1888, and perhaps we should examine the constitutionality of that decision instead. At the core, I believe that if in fact the courts declare that Congress cannot authorize the Federal Government to bring suits on behalf of tribes regarding tenth and eleventh waivers of immunity, then I would say all of Indian law is now subject to question.

Mr. RICHARDSON. I will recognize Mr. Straus, but basically what I am getting at, isn't it in effect the Congress's right to have more power over Indian commerce than it does over interstate commerce?

Mr. STRAUS. Absolutely, but I would like to add to what Ms. Williams said that even if the court somehow found that there was a distinction and that the power of Congress was less in Indian commerce, which I don't think is the case. In fact, I think it is stronger over Indian commerce—there is controlling Supreme Court precedent, *Pennsylvania* v. *Union Gas*, saying that Congress has the power under the Interstate Commerce Clause to abrogate State immunity and allow private suits against the States. That is the law of the land until a later Supreme Court overturns it.

There is no dispute about the fact that the Indian Gaming Regulatory Act was passed not only under the Congress's power under the Indian Commerce Clause; it was also passed under the Interstate Commerce Clause because of the concerns mentioned earlier about the possibility of organized crime infiltration. So there is a double-barreled thing and there is plenty of ground to support what Congress did.

Mr. RICHARDSON. Mr. Feldman, do you want to add anything?

Mr. FELDMAN. I think they have pretty well covered it. The question you raise is basically the difference between those courts that have upheld the eleventh Amendment challenging and those who have denied it.

Mr. RICHARDSON. The good faith issue—States have said that because the tribes have the upper hand in the compacting process because of the obligation on the part of States to institute good faith and negotiations. Could you explain your view of this provision?

As you know, States have argued that there is no mutuality in this provision and that it should be the burden on the complaining party to initiate good faith.

Mr. FELDMAN. Well, the problem that Congress was trying to deal with when it imposed the good faith requirement on the States is that alluded to earlier, that without that mechanism, tribes would have no leverage to bring States to the bargaining table. There would be no mechanism by which States could be required to negotiate.

So the good faith obligation is, in my view, a smokescreen advanced by the States who don't want to participate in the class III gaming negotiations. There is nothing in the good faith requirement that imposes any obligation on the States to act in a way that they wouldn't otherwise have to act. They have a choice. They either come to the table and negotiate over the scope of gaming, or they can sit back and do nothing and allow the Federal process to go forward.

So I think the argument that somehow tribes should be subject to a good faith requirement, if that is what the States are suggesting, is meaningless. The tribes want to negotiate compacts. They are going to do everything they can to negotiate compacts.

If you look at the facts and the circumstances, it is the tribes who are at the table. It is the States who are not at the table. I think the good faith requirement is simply a mechanism to encourage the States to come forward and negotiate as Congress intended.

Mr. RICHARDSON. Susan, please comment on the mutuality issue as related to the New Mexico situation.

Ms. WILLIAMS. In IGRA Congress recognized that by subjecting tribes to State participation in class III gaming, the Congress was putting tribes at a major disadvantage. The tribal sovereignty was diminished as a result. The sovereignty that had been hard fought and won in the *Cabazon* case, States have far more resources as a general rule than do most Indian tribes.

So I think Congress properly thought that in the circumstances of class III gaming, there needed to be some kind of incentive for the States to come to the table. I think that is extremely important and I think States are on the other side of the coin missing that opportunity offered by class III compacting, because in deference to the concerns raised by some of the members regarding a need to be sensitive to the States' concerns, while I think most tribes acknowledge that, there are important State interests at stake and State concerns, stripping away all of the transparence, the economic and private gain ones, some States are very concerned about proliferation of gambling in their State. But Congress provided a scheme for States to step away and work that out in the context of these class III compact negotiations.

In the case of New Mexico, for the State to flatly refuse to negotiate, it is making not only a serious mistake in terms of violation of Federal law and policy and IGRA, but a serious political mistake in the context of its own State interests. If a State refuses to negotiate altogether, it is forcing Congress to step in and perhaps find a mechanism for forcing the State to the table. If the State would put the process before a mediator, let the process run forward, let an unbiased forum decide the differences between the State and the tribes, many of the political brush fires that are going on will be put to rest.

Let's put this to some sort of unbiased fair forum. I don't know what the States are afraid of. All these problems would go away if we could get on with the negotiations and look at gambling. If gambling is authorized by mediators that is far in excess of States' public policy, then Congress might have something to look at at that time in the future. But that is not the record of those few instances where States have put the matter before the mediators.

Mr. RICHARDSON. I agree that it can be worked out in our State.

Mr. Straus?

Mr. STRAUS. I think in assessing the State's claims about good faith, you ought to look at what Congress actually provided. In 25 U.S. Code 2710, in a suit brought by a tribe claiming that a State has not negotiated in good faith, the court "may take into account the public interest, public safety, criminality, financial integrity and adverse economic impacts on existing gaming activities." This is very open-ended.

When this Act was passed, my tribal clients asked me what this meant. I said I am not really sure, but it is not good for you. This gives the States tremendous bargaining power that will be very hard for you to overcome in any negotiations that occur.

It doesn't mean, however, that the States can simply refuse to come to the table and refuse to negotiate. That is the one thing they can't do. They can't stonewall. If there is going to be an adverse impact to the existing gaming activities, they have to show that. If the gaming proposed by the tribe is not in the public interest, not in the tribal interest, they can't just say it; they have to be able to show it to the court.

Even so, I think the bargaining power is still with the States in this process if they let the process go forward.

Mr. RICHARDSON. Thank you very much.

Let me just announce that I appreciate all of the witnesses. I think you have made some very important testimony.

We hope at our next hearing to have representatives from the horse racing, dog racing, Attorneys General and non-Indian casinos. Our hearing will either be here in Washington or Atlantic City or Las Vegas.

It is the position of this Committee to continue these hearings and deal with this issue in an exhaustive way. I think the hearing here, which is the second one that we have held, has been extremely important.

We will also be holding a hearing in Green Bay, Wisconsin, on June 27 to continue this process. Our hope is to hold a hearing on, I guess, the non-Indian casinos and the dog racing and A.G.s prior to the late June hearing.

I want to commend all witnesses for their testimony this morning. It has been very helpful and useful. We had good attendance from members of the subcommittee. Those of you who have prepared extensively, as I know all of the attorneys here have and have a long record on this issue, that your testimony this morning has been very valued and is most appreciated.

With that, the hearing is adjourned.

[Whereupon, at 11:45 a.m., the subcommittee was adjourned.]

APPENDIX

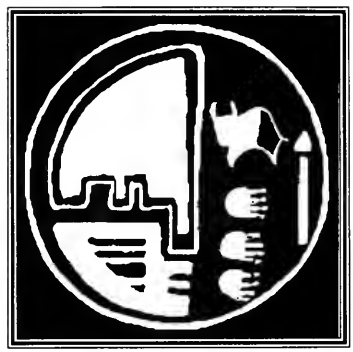
JUNE 7, 1993

ADDITIONAL MATERIAL SUBMITTED FOR THE HEARING RECORD

RESERVATION-BASED GAMING

NATIONAL INDIAN POLICY CENTER

FOREWORD



The National Indian Policy Center, located at The George Washington University in Washington, DC, was created by congress in 1990 and charged with determining whether a federally chartered Indian policy research institution could provide Indian tribes, Congress and the executive branch with much-needed assistonce in evaluating and developing policy initiatives. The policy center is governed by a committee of tribal leaders and representatives of Indian organizations and administered with the assistance of the university's office of sponsored research.

Legislation to establish the Center as a federally chartered research institute will be considered in the current session of Congress. This report on Indian gaming is one of a series of demonstration research projects designed to give NIPC a base of experience in commissioning research that explores public policy issues on a timely and multi-faceted basis.

The National Indian Policy Center is being funded through a cooperative agreement between the Administration for native Americans (ANA) and The George Washington University Funds were added to the ANA 1991 through 1993 fiscal year budgets specifically for this project.

NATIONAL INDIAN POLICY CENTER

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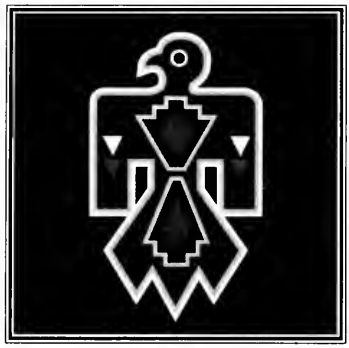
TABLE OF CONTENTS



INTRODUCTION

Perhaps the most important element in any public policy debate is the availability of informative and objective analysis on the issues involved. Policies related to American Indians and Alaskan Natives have traditionally suffered from a severe lack of this kind of information, often resulting in wide-spread misconceptions among the public and the government officials whose actions and decisions directly affect Indian people. The current controversy regarding the operation of reservation-based gaming facilities -- an industry that grew 105 percent in 1991 -- is no exception.

As a means of responding to this need in the policy-making process, the National Indian Policy Center regularly entertains requests for research from the Indian tribes, organizations and government offices. At the March 18, 1993, National Summit on Indian Gaming in Washington, DC, tribal leaders expressed a need for researching several issues of critical importance to policy makers generated by the success of tribes involved in gaming since Congress enacted the Indian Gaming Regulatory Act (IGRA) in 1988. NIPC responded by commissioning reports in four areas related to gaming on Indian reservations: public opinion, economic impacts, tribal-state negotiations, and litigation.

Indian law expert Glenn M. Feldman based his report, entitled "**Survey of Public Opinion Regarding Indian Gaming,**" on 1992 polls conducted in Washington, Arizona, California and Kansas, as well as a national survey by Harris Poll (which excluded residents of Nevada and New Jersey). All the polls show that, on the average, people living off reservations support Indian gaming much more than they do general gaming throughout the state. The report also includes reasons given by the respondents in the State of Washington for supporting Indian gaming. Over 80 percent cited either economic considerations -- jobs, revenue and reduction of welfare -- or tribal sovereignty. Feldman points out that, significantly, those were two of the primary reasons given by Congress in enacting the Indian Gaming Regulatory Act in 1988. Mr. Feldman is associated with the law firm of O'Connor, Cavanagh, Andersen, Westover, Killingsworth & Beshears, which is based in Phoenix, Arizona.

In "**The Economic Impact of Indian Reservation-Based Gaming Activities,**" Robert Robinson of the Center for Applied Research provides estimates of Indian gaming revenues and how they are expended. Using estimated 1992 gaming revenues from existing facilities, the report shows that besides being a source of much-needed capital for tribal governments, expenditures related to management, operations and general employment, also typically benefit both Indian and non-Indian local economies. The money earned by non-Indian employees, contractors and suppliers provides a source of tax revenues to the states. The report also shows that over half of Indian household income, regardless of how it was earned, is spent off the reservations. The Center for Applied Research is located in Denver, Colorado.

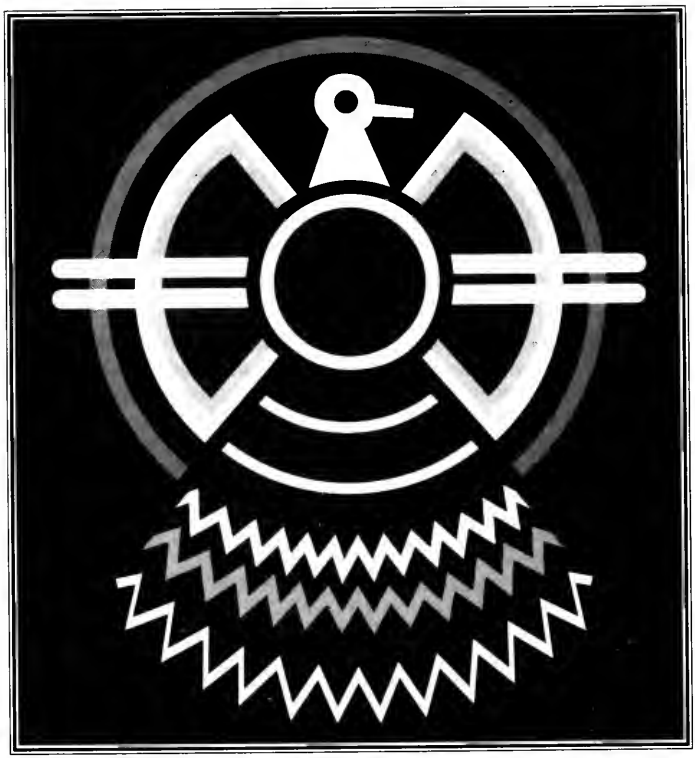
"**Tribal-State Gambling Compacts Under the Provisions for Class III Gaming in the**

Federal Indian Gaming Act (IGRA)," was prepared by Harold A. Monteau of the law firm Monteau, Guenther & Decker, P.C. It describes the process and outlines the history of the tribal-state negotiations required to establish such games as blackjack, slot machines and horse racing. The report also provides a state-by-state list of existing agreements and the games conducted under them.

"A Summary of the Caselaw Interpreting the Indian Gaming Regulatory Act," is one of two reports that serve as reference materials for the legal and contractual histories of Indian gaming. The report, prepared by Douglas B. L. Endreson of the law firm Sonosky, Chambers, Sachse & Endreson, gives an overview of litigation generated by the IGRA since its enactment. It covers such areas as the states' obligation to conduct compact negotiations with the tribes in "good faith," 10th and 11th Amendment state sovereignty challenges, "grandfathered" games and determining the classification of a particular type of game.

These reports have been provided to tribal leaders, members of Congress, government officials, the media and other interested parties. It is NIPC's hope that they will contribute in a positive way to the policy-making process and to public understanding of the issues related to Indian gaming.

SURVEY OF PUBLIC OPINION REGARDING INDIAN GAMING



Prepared for the National Indian Policy Center

By

Glen M. Feldman

O'Connor Cavanagh

INTRODUCTION

The American people strongly support the right of Indian tribes to operate and expand class III gaming facilities on their reservations. A broad array of recent public opinion data, collected at both the national level and within selected states, clearly demonstrates that the public generally supports Indian gaming, at the same time that it is ambivalent at best about expanding non-Indian gaming activities. In addition, the data show that many people support Indian gaming for the same reasons that Congress enacted the Indian Gaming Regulatory Act in 1988: because Indian tribes, as sovereign governments, should be allowed to decide for themselves what types of gaming occur on their reservations, and because the revenues derived from gaming are being used to make the tribes economically self-sufficient.

In October, 1992, the Harris Poll released the results of a nation-wide survey of 1,205 adults living in states other than Nevada and New Jersey.[1] When respondents were asked whether they favored or opposed casino gambling within their own state, the results showed 46% in favor, 51% opposed and 3% were not sure. When the question was rephrased to ask about casino gambling within the respondent's local community, the favorable responses dropped to 42% and the percentage in opposition increased to 56%, with 2% undecided. However, when the survey inquired about casino gambling on Indian reservations, the results were dramatically different, as reflected in the following table:

II. ATTITUDE TO GAMBLING ON INDIAN RESERVATIONS

"How about gambling on Indian reservations? Do you think Indian reservations, which want to, should be allowed to have casino gambling on their land or not?"

	Total %
Should be allowed	68
Should not	28
Not sure	4

As the Harris Poll report correctly noted, while there was no consensus among Americans with respect to allowing casino gambling generally, "by a large 62-28 percent majority, most

people believe reservations should be allowed to have casino gambling on their land if they so desire." Thus, the American people can and do distinguish between expanded non-Indian gaming, which is not broadly supported, and Indian gaming, which enjoys a greater than 2 to 1 approval rating.

Similar results have been obtained from public opinion surveys within various states. In Washington state, a representative sample of 554 adult heads of household was surveyed in August, 1992, under the direction of Dr. Bruce D. Merrill, the Director of the Cactus State Poll and the Media Research Program at Arizona State University.[2] When respondents were asked whether they supported or opposed gaming on Indian reservations in Washington, 62% expressed support for Indian gaming, while 26% were opposed and 12% had no opinion. When asked whether specific forms of Class III gaming should be allowed on the reservations, the results were as follows:

	SHOULD BE ALLOWED	SHOULD NOT BE ALLOWED	NO OPINION
Electronic games like video poker	67%	24%	9%
Card games like poker and blackjack	65%	28%	7%
Live parimutuel betting on horses	63%	25%	12%
Table games like craps	60%	32%	8%
Off-track betting on horses	54%	34%	12%

While there was some variation with respect to different gaming activities, each of the forms of gambling proposed for the reservations was supported by a substantial margin.

On the other hand, the public was only evenly divided with respect to legalizing gambling off the reservations, with 44% in favor, 45% opposed, and 11% undecided. As was the case with the national survey reported by the Harris Poll, the people of Washington clearly distinguished between expanded Indian gaming, which was generally supported, and expanded non-Indian gaming, which was not.

Equally significant were the reasons given by those Washington respondents who supported reservation gaming. Of those who offered specific reasons, the largest group -- 42% -- mentioned economic considerations: employment, jobs, revenues and reducing welfare. The second most frequently mentioned reason, at 39%, involved notions of tribal sovereignty, with respondents commenting that "it's their land," "it's up to them," and "they should decide for themselves." Interestingly, these are among the very reasons that Congress enacted the Indian Gaming Regulatory Act in 1988. In the findings and purposes provisions of that Act, Congress noted that:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.[3]

In addition, Congress expressly stated that the Act was intended:

> to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments.[4]

Like Congress, the people of Washington viewed tribal sovereignty and economic development as the principal reasons for supporting expanded Indian gaming in the state.

More recently, similar results were obtained when the Field Research Corporation surveyed 554 adults in California during November, 1992.[5] Overwhelming majorities of the respondents favored keeping bingo and poker legal on Indian reservations:

	SHOULD REMAIN LEGAL	SHOULD NOT REMAIN LEGAL	NO OPINION
Bingo	82%	14%	4%
Poker	72%	25%	3%

At the same time, substantial majorities favored allowing Indian tribes to expand into various forms of Class III gaming, as the following table demonstrates:

CALIFORNIANS' APPROVAL/DISAPPROVAL OF ALLOWING
OTHER FORMS OF PUBLIC GAMBLING ON INDIAN OR NATIVE AMERICAN
LANDS/RESERVATIONS IN CALIFORNIA

	Approve	Disapprove	No Opinion
Lottery games	75%	23%	2%
Electronic video games, like video poker	62	35	3
Slot machines	62	36	2
Roulette, Wheel of Fortune, and other table games of chance	63	35	2
Keno	68	27	5
Blackjack	63	35	2

As was the case in the other surveys, Californians are far less supportive of expanded non-Indian gaming. When asked about allowing some of these same forms of gaming in the state off of Indian reservations, the approval ratings declined and the disapproval ratings increased significantly:

CALIFORNIANS' APPROVAL/DISAPPROVAL OF ALLOWING
OTHER FORMS OF PUBLIC GAMBLING IN CALIFORNIA
OFF THE RESERVATIONS

	Approve	Disapprove	No Opinion
Electronic video games like video poker	48%	49%	3%
Slot machines	51	48	1
Roulette, Wheel of Fortune, and other table games of chance	53	45	2
Blackjack card parlors	47	49	4

As is the case elsewhere, the people of California are far more supportive of expanded

gaming on Indian reservations than they are of expanded gaming in general.

The California survey also asked respondents why they supported or opposed expanded Indian gaming. Like the Washington results, Californians who supported Indian gaming focused on the economic benefits to tribes and, to a lesser degree, on the concept of tribal self-government. Among the most widely given responses were the following:

Legalized gambling will help Indians/Native Americans	28%
Legalized gambling will provide money for health, education and welfare	26%
It's the only way Native Americans can earn money	12%
Indians/Native Americans should be able to use their land any way they want	11%

In contrast, among those who opposed expanded gaming on Indian reservations, the most frequently given reason (although offered by only 7% of the total sample) was that the respondent opposed all gambling: Indian or non-Indian.

Although the information is less extensive, public support for casino gambling on Indian reservations in Kansas has also been reported. According to a single-question poll conducted by The Kansas City Star and a Kansas City television station in October, 1992, 58% of the statewide respondents thought that tribes should be allowed to conduct casino gambling operations on their reservations in Kansas, while 28% were opposed and 14% had no opinion.[6] Support was even stronger in urban areas of the state, where 62% favored tribally operated casinos, 25% were opposed and 13% were undecided.

Finally, public opinion information from Arizona is instructive not only with respect to support for tribal gaming, but also with how the public responds when it perceives that tribes are being treated unfairly by state officials. In May, 1992, shortly after a series of widely publicized seizures of slot machines on Indian reservations in Arizona, a statewide poll of 458 registered voters found that 66% favored "allowing the Indians to have gambling on their reservations," while 21% were opposed and 19% had no opinion.[7] At the same

time, the voters were generally opposed to legalizing casino gambling elsewhere in Arizona, with only 35% in favor, 50% opposed and 15% with no opinion.

More recently, Indian gaming has been back in the news in Arizona. In late 1992, the state entered into four compacts which authorized those four tribes to operate up to 250 slot machines per reservation. However, three other tribes would not agree to this limitation, arguing that the number of slot machines should vary, depending on the size, needs and location of the different reservations. When no compromise could be reached, the dispute was put into the hands of a federal mediator. On February 15, 1993, the mediator issued a ruling that agreed with the tribes' position and that would authorize up to 2600 machines and some table games for one large, economically depressed reservation near Tucson, and up to 1800 machines and table games for two other tribes.

Governor Fife Symington's reaction to the mediator's decision was swift and harsh. He immediately called a special session of the State Legislature for the purpose of enacting a bill that would criminally prohibit slot machines and other forms of class III gaming within the state. While the legal effect of that legislation, which was signed into law on March 5, 1993, is unclear, it was widely perceived as intended to thwart the implementation of the mediator's decision and to invalidate the four existing 250 machine compacts.

Recent polling data indicates, however, that the Governor's anti-Indian gaming are not in step with the Arizona population. The public still supports expanded gaming on Indian reservations in Arizona, as two statewide polls taken in March, 1993, indicate:

"Do you favor or oppose allowing Indians to have casino gambling on the reservations?[8]

Favor	57%
Oppose	35%
Don't know	8%

"Do you favor or oppose allowing the following forms of gambling on the Indian reservations?[9]

	Favor	Oppose	Don't Know
Bingo and limited slot machine-style gambling	72%	22%	6%
Full scale casino gambling	48%	44%	8%

Yet, as a result of the most recent Indian gaming controversy in Arizona, Governor Symington's popularity has dropped dramatically. According to recent published reports:

> Governor Fife Symington's approval rating plummeted 15 percentage points in the past month, primarily due to his stance on Indian gaming, a new poll says.
>
> * * *
>
> The chief reason cited for the downturn is Symington's opposition to casino-style gaming on Indian reservations.[10]
>
> A poll released Wednesday found Symington's stand on Indian gambling was the major factor weakening voter confidence in their chief executive from a month ago.
>
> * * *
>
> . . . among the 36 percent whose view became less favorable, Symington's campaign to restrain expansion of Indian gambling was cited by 39 percent.[11]

II. CONCLUSION

Public officials who have opposed Indian gaming activities have repeatedly argued that the public does not support gaming on Indian reservations and that expanded Indian gaming will inevitably lead to full-scale casino gambling elsewhere in the state. Current public opinion information, however, demonstrates that neither of these allegations is correct. Expanded Indian gaming is broadly supported by the general public at the same time that public opinion generally opposes expanded casino gambling off the reservations. In addition, the American people support Indian gaming because they view it as a legitimate exercise of tribal self-government and a means of achieving economic self-sufficiency for Native Americans. Finally, if recent events in Arizona are illustrative, voters may take a dim view of state officials who are perceived as unfairly seeking to limit Indian gaming opportunities.

ENDNOTES

1. The Harris Poll, "Public Ambivalent About Casino Gambling In General, But Opposes Allowing It in Nearest City," October 4, 1992. The margin of error for the survey was +/- 3%.

2. Bruce D. Merrill, Ph.D., "Attitudes of People Living In Washington Toward Gaming on Indian Reservations," August 4, 1992. The margin of error for the survey was +/- 4.2%.

3. 25 U.S.C. ss 2701 (5).

4. 25 U.S.C. ss 2702 (1).

5. Field Research Corporation, "Californians' Attitudes Toward Legalized Gambling Statewide and On Indian or Native American Lands On Reservations In California," January, 1993. The sampling error for the survey was +/- 4.4%.

6. The Kansas City Star, "Indian Casinos Receive Strong Support In State," October 27, 1992.

7. The Arizona Republic, "Gambling Poll," May 21, 1992, at A8.

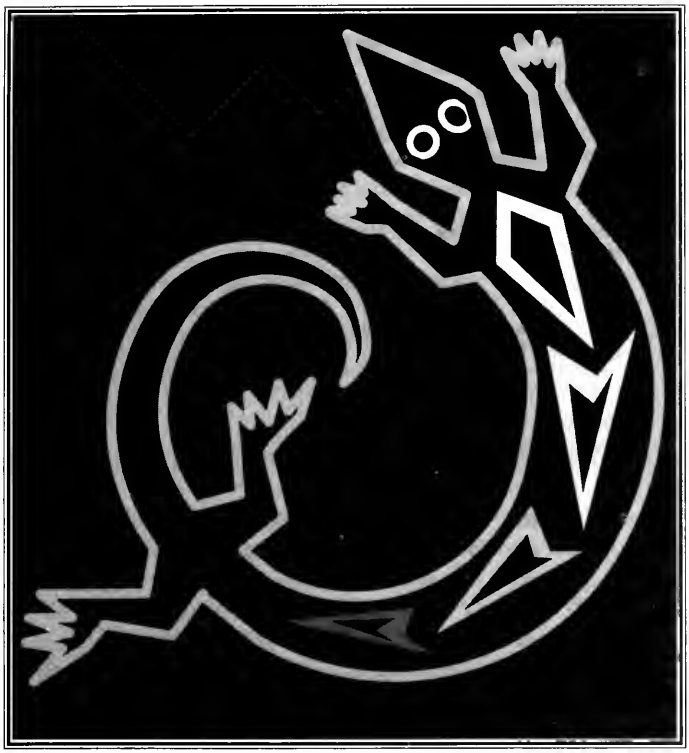
8. The Arizona Republic, "Poll: 57% Back Indian Gaming," March 2, 1993, at A6. The survey, conducted by Dr. Merrill, sampled 319 registered voters statewide and had a sampling error of +/- 5.5%.

9. The Arizona Republic, "72% In Poll Back Indian Gaming," March 10, 1993. This poll surveyed 800 adults statewide and had a margin of error of +/- 3%.

10. The Arizona Republic, "Symington Rating In Poll Drops Over Indian Gambling," March 4, 1993.

11. Scottsdale Progress, "Poll Shows Symington Hurt By Indian Gambling Stance," March 4, 1993.

THE ECONOMIC IMPACT OF INDIAN RESERVATION-BASED GAMING ACTIVITIES



Prepared for the National Indian Policy Center

By

Robert Robinson

The Center for Applied Research

Table of Contents

INTRODUCTION

The economic and fiscal impacts of gaming on Indian reservations occur at various levels: there are impacts on tribal governments, individual tribal members and tribal and non-tribal entrepreneurs, both on and off the reservation. There are also impacts on states and other non-tribal governmental jurisdictions in proximity to reservation gaming activities. Public debate regarding the monetary costs and benefits of reservation-based gaming frequently focus exclusively on state government or tribal government. Rarely, if ever, is there a balanced appraisal of the diffuse economic and fiscal impacts of gaming (both beneficial and adverse), that accrue not only to tribes and states, but to counties, school districts, special districts, private industry and a host of public and private interests who are directly and indirectly affected by reservation gaming enterprises.

This report does not purport to be a comprehensive analysis of all direct and indirect impacts of Indian gaming; it focuses on the principal ***economic components*** of reservation-based gaming while providing only general insight into the effects that gaming has on the fiscal conditions of tribal and non-tribal governmental jurisdictions.

II. SUMMARY OF THE ECONOMIC IMPACTS OF RESERVATION GAMING

Table 1, "Estimated 1992 Indian Gaming Revenues," presents a summary of the economic attributes of all reservation based gaming activities in the country. This summary has been constructed from existing published data and from information obtained through an expedited primary research effort conducted by the Center for Applied Research.[1] Table 1 contains estimates of the total 1992 wager (or "handle") associated with Class II and Class III Indian gaming, an estimate of the total, gross 1992 revenue (or "take"), an estimate of the total management costs associated with reservation based gaming, an estimate of wage and salary payments and operating costs associated with Indian gaming and lastly, an estimate of the net profit earned by tribes.

The revenue categories and amounts listed in Table 1 are viewed as positive economic ramifications of gaming in a reservation economy; they allude as well, to the less

[1] The Center for Applied Research conducted a telephone-based survey of selected tribes and contacted various specialists in the areas of Indian gaming and state and local finance.

obvious positive impacts that gaming can have in non-Indian jurisdictions that are linked economically to a reservation with gaming. A portion of the ***management costs*** incurred by tribes for gaming management services is paid out, for example, in the form of local wages and salaries. Other management expenditures are made for the acquisition of local services of all types. These management expenditures support employment and income creation among both Indian and non-Indian populations.

A portion (if not all) of the gaming ***operating expenses*** incurred by a tribe are also expended locally, supporting Indian and non-Indian employment on and off the reservation. Direct employment in gaming operations, another important economic component of Indian gaming enterprises, is typically comprised of both Indian and non-Indian job-holders. The **wage and salary income** earned by these gaming operation employees are expended locally and as noted below, induce further job and income growth.

The ***net revenue*** from gaming (tribal profit) is a source of capital for tribal government which is used primarily for the type of governmental expenditures that non-Indian governments expend from tax revenues. Congressional hearings conducted on Indian gaming revealed that most of the profits from successful enterprises have been appropriated by tribal governments for higher education scholarships, enhanced health care, employment and similar citizen benefits.[2] For example, in addition to its annual capital outlays off the reservation, the Mashantucket Pequot Tribe in Connecticut has augmented the market-based impacts of its gaming operations by contributing $1 million per year to "Mystic Coast and Country of Mystic", a regional non-Indian organization promoting tourism in Connecticut.

Since Table 1 is the product of an estimating procedure, it should not be construed as the "final word " in gaming economics impact assessment. However, Table 1 accurately portrays how the stream of gross revenue from reservation gaming is distributed to a diverse group of Indian and non-Indian interests associated with a reservation gaming operation. As noted below, considerable improvement in the collection and analysis of gaming and reservation-wide economic data will be necessary before authoritative assessments of the economic and fiscal impacts of reservation based gaming enterprises can be obtained.

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[2]As noted in the Bibliography attached to this report, studies documenting the various public purpose expenditures of Indian gaming profits by tribes have also been conducted. Note in particular findings related to tribal experiences in studies of Indian gaming in Minnesota, Wisconsin, and Michigan.

TABLE 1

ESTIMATED 1992 INDIAN GAMING REVENUES ($000)

Source. The Center for Applied Research, 1993

States/Tribes with Gaming Operations	Total Wagered	Gross Revenue	Management Costs	Wage & Salary Payments	Operating Costs	Net Pro to Trib
Michigan (8)	696,000	48,720	19,488	13,498	2,436	12,
Wisconsin (9)	1,100,000	77,000	30,800	35,812	3,850	19,
Minnesota (11)	900,000	63,000	25,200	29,302	3,150	15,
California (14)	1,366,000	95,620	38,249	44,900	4,781	23,
Coloredo (2)*	157,000	10,990	4,396	3,080	550	2,
South Dakota (3)	330,000	23,100	9,240	2,800	1,155	5,
Connecticut (1)	2,000,000	190,000	72,000	56,000	9,000	45,
Nebraska (2)	90,000	6,300	2,520	3,246	315	1,
Washington (8)	200,000	14,000	5,600	9,759	700	3,
Arizona (6)	100,000	7,000	2,800	5,088	350	1,
All Others (24)	600,000	42,000	16,800	19,530	2,100	10,
Total (91)	7,539,000	567,730	227,092	222,694	28,387	141,
Total Class II	2,638,650	198,706	79,482	78,013	9,935	49,
Total Class III	4,900,350	369,025	147,610	144,981	18,451	92,

*Annual estimates based on partial year operations

II. DIRECT AND INDUCED ECONOMIC IMPACTS OF RESERVATION BASED GAMING

The estimate of wage and salary income shown in Table 1 is conservative in that it relates to **direct** employees of Indian gaming operations only. There are differences in the way certain tribes and industry analysts describe the direct, indirect, and induced employment impacts of gaming. For example, tribal government employees assigned to gaming related matters are often included in published estimates of direct gaming employment. Similarly, the employment generated by gaming management and operations is also referred to at times, as part of the direct employment impact of reservation gaming.

In this analysis, only employees directly engaged in gaming operations *per se* serve as the basis for the wage and salary income estimate in Table 1. Tribal government employment and employment created off the reservation due to expenditures by tribal government, gaming management or operations is viewed as indirect employment. The employment (and wage and salary income) fostered by virtue of consumer spending made by all direct and indirect employees may be characterized as "induced" economic activity.

Based on research conducted for this report, it is estimated that 15,900 persons are directly employed by reservation gaming activities nation wide. This would indicate that some 22,000 additional jobs are supported by reservation based gaming.[3]

III. RESERVATION GAMING AND STATE-TRIBAL RELATIONS

There has been a good deal of confusing, even misleading data published on reservation based gaming. However, the work of knowledgeable professionals who monitor revenues associated with the U.S. gaming industry sheds some light on the relative importance (i.e. market share) of Indian gaming within the overall industry. Comparisons of the 1990 and 1991 total industry handle made by one acknowledged authority in the field, Christiansen/Cummings Associates, show Indian gaming enterprises to be the fastest growing sector of the gaming industry. More importantly, while Indian gaming grew 105% in 1991 (and exhibited even greater strength in 1992), the growth in the total industry was

[3]Based on the latest U.S. Department of Commerce RIMS multiplier series, it is estimated that one gaming job generates on average 1.4 additional jobs in the host economy.

less than 1%, and some segments of the industry experienced decline.[4]

This trend elicits two important lines of inquiry about the industry as a whole and the place that Indian gaming occupies within it. The first line of inquiry is whether a ceiling may have been reached in the gaming industry (i.e., whether the market is "saturated"), or whether the poorly performing economy produced an anomalous slow year for gaming in 1991. The second line of inquiry is whether Indian gaming may be drawing consumers away from other gaming enterprises, particularly state supported lotteries. Whether there is an appreciable impact of the increase in Indian gaming on state tax revenues from non-Indian gaming is unknown but would presumably be very nominal. If the market is saturated, the growth in Indian gaming marks tribes as strong (and unwelcome) competitors for a larger piece of a static gaming pie.

The shifting fortunes of the non-Indian segment of the gaming industry is at least one factor influencing the current debate over Indian gaming. The issue can no longer be framed as an ostensible conflict over local moral values. Indian gaming has become a competitive economic issue and this provides a new and different impetus for public political debate. Ultimately, this more limited economic perspective should provide firmer, more neutral ground for rational, objective discussion and study of Indian gaming.

IV. APPRECIATING THE LARGER STATE-TRIBAL ECONOMIC RELATIONSHIP

From a macro perspective Indian gaming must be seen as simply one segment of a larger state-reservation economic relationship. Table 2, "Household Income and State Sales Tax Revenues Attributable to Indian Reservations," provides one view of the complex economic and fiscal relationship that exists between state and local economies and Indian reservations, a relationship that is manifested in some 33 states in the country. Table 2 shows the progression of Indian earned and unearned income, from its source on the reservation, through the regional market environment. State and local sales tax revenue receipts are the ultimate evidence of the inexorable flow of Indian income from reservation

[4] E.M. Christiansen, Patricia McQueen, and Jennifer Cesa. "Gross Annual Wager of the United States Parts I & II", Christiansen/Cummings and Associates: New York, 1992.

to non-reservation economies.[5]

Table 2 shows that a substantial portion of personal Indian income, whether earned from gaming or from any other enterprise, ultimately enters the state economy via tribal household expenditures. Consumer spending by tribal members (and tribal governments as well) is a seldom recognized but powerful direct stimulus of job and income growth in non-Indian communities. And tourist expenditures for transportation, food, lodging, and other services which are fostered in part by gaming in some reservation settings, can also be cited as a benefit to non-Indian businesses.

Certain assumptions about Indian consumer spending, savings and investment patterns are embodied in Table 2. These are: (1) a minimum of 50% of Indian household income is spent off the reservation; (2) 25% of Indian consumer expenditures off the reservation are subject to state or local sales tax (i.e., spent on taxable consumer goods such as clothing and durables); and (3) the average of all sales tax rates for taxing states is 5%. The key observation to be made from Table 2 is that the taxable expenditures and sales tax revenues occasioned by Indian consumer spending accrue as benefits to the states and other non-Indian jurisdictions which are in proximity to reservation lands. Based on the conservative assumptions stated above, Indians living on reservations in 1990 directly contributed over $21 million in state sales tax revenues nation wide. Indians who earn income off the reservation also pay income tax to the state, and all Indians pay federal income tax. The sales, income and property tax payments associated with Indian government economic activity off the reservation would logically be added to the amount shown in Table 2, as would any non-Indian governmental expenditures incurred as a result of the economic presence of the reservation.

[5]Halting this "leakage" of personal income from the reservation (the reservation's "trade deficit") is a cornerstone of every American Indian tribe's economic development strategy.

TABLE 2
HOUSEHOLD INCOME AND SELECTED STATE ECONOMIC AND FISCAL IMPACTS ATTRIBUTABLE TO INDIAN TRIBES
SOURCE: CENTER FOR APPLIED RESEARCH, 1993

NUMBER OF HOUSEHOLDS[6]	HOUSEHOLD MEDIAN INCOME[7]	TOTAL HOUSEHOLD INCOME[8] (000,000)	ESTIMATED OFF-RESERVATION EXPENDITURES[9] (000,000)	ESTIMATED TAXABLE OFF-RESERVATION EXPENDITURES[10] (000,000)	ESTIMATED SALES TAX REVENUES FROM OFF-RESERVATION EXPENDITURES[11](000,000)
173,581	$20,025	$3,475.9	$1737.9	$434.5	$21.7

V. THE NEED FOR SYSTEMATIC DATA ACQUISITION AND ANALYSIS

The absence of a detailed, authoritative profile of Indian gaming economics reflects the absence of a national socioeconomic data collection effort[12] and an analytical capability that could be used to monitor all reservation-based economic activities and their intersection with adjacent non-Indian governments and economic enterprises. Federal policy makers, members of Congress, state and local government officials, gaming concerns, other private sector interests, and tribal governments are clearly in need of an information system capable of illuminating the complex web of economic and fiscal interactions between tribal and non-tribal interests. In the absence of such a system, informed policy debate, whether carried on between allies or conflicting parties, whether concerned with natural resources, human

[6] 1990 U.S. CENSUS

[7] 1990 U.S. CENSUS.

[8] CENTER FOR APPLIED RESEARCH

[9] CENTER FOR APPLIED RESEARCH.

[10] CENTER FOR APPLIED RESEARCH.

[11] U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

[12]See the National Indian Policy Center proposal calling for the creation of a national socioeconomic data bank for tribes and reservations.

services or the gaming issue, will be difficult to achieve. Cooperative analysis of the gaming issue (like the dual taxation issue and other volatile state-tribal issues) will continue to be impeded by the lack of authoritative data and objective analysis of the subject.

Finally, while it is recognized that both non-Indian and Indian tribal governments bear adverse impacts or fiscal costs due to the existence of reservation gaming enterprises, the precise incidence and magnitude of such costs are not known at the present time. It would be possible to readily identify and apportion such costs with the kind of systematic data collection and analytical efforts referred to above. The inclusion of the fiscal effects of reservation based gaming would be essential to achieve a balanced perspective on the Indian gaming issue.

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The Attorneys General have compiled an extensive, even-handed history of the IGRA; this compilation is accompanied by a summary of the case law associated with the Act and recommendations as to how it ought to be amended to clarify some of its ambiguities. One of the important references in the report is to an exhaustive 900 page resource book on Indian gaming which includes hard copies of the major documents regarding the legislative history, the regulations of the National Indian Gaming Commission, a digest of the judicial decisions on the IGRA, an abstract of state compacts, and an index to media coverage of Indian gaming.

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This is a handbook of case law regarding Indian individual and Tribal rights. Divided into eighteen chapters addressing such issues as Taxation, Tribal Self-Government, State Power over Indian Affairs, and Judicial Review, the handbook summarizes the cases which have helped to define and clarify Tribal sovereignty and the relationships of the Tribes to the States and the Federal Government.

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This is an annotated publication which discusses almost all aspects of Indian gaming law. Some of the topics included are IGRA, its legislative history and amendments, and a review of notices and regulations published in the Federal Register about Indian gaming. The Manual also includes information about the Indian Gaming Commission (including key staff) and a review of court decisions about gaming.

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policies and a moratorium on new legalizations of gambling until such policy can be formulated. He suggests that a national body of state, tribal and other interests form to develop and implement standards for the national policy. Finally, he offers some suggestions about those standards.

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SUMMARY OF TRIBAL-STATE GAMBLING COMPACTS FOR CLASS III GAMING

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INTRODUCTION

In 1988, the United States Congress passed the Indian Gaming Regulatory Act (IGRA) to provide a statutory basis for the operation, regulation and protection of Indian gaming. This paper summarizes the types of gaming currently taking place in Indian country, particularly those activities connected with gaming compacts between tribes and states. The tribal-state Class III compacting provisions of the IGRA are found at 25 U.S.C. §2710(d) et seq. Class III Gaming is defined in 25 U.S.C. §2703(8) simply as "all forms of gaming that are not Class I or Class II." Class I is defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. §2703(6).

Class II, as defined in 25 U.S.C. §2703(A)(B)(C) and (D), includes bingo and bingo-like variations (whether or not electronic, computer, or other technologic aids are used) and card games that are explicitly authorized by state law or not explicitly prohibited by state law and played in conformity with state law. The term does not include banking card games including baccarat, chemin de fer or blackjack or electronic or electromechanical facsimiles of any game of chance or slot machines.

The IGRA provides that Class III gaming activities shall be lawful on Indian lands **only if such activities are conducted pursuant to a tribal ordinance that permits Class III gaming on the reservation and/or off reservation trust lands of the respective tribe, are located in a state that permits such gaming for any purpose by any person, organization, or entity and is conducted in conformance with a tribal-state compact.** The tribal ordinance must address the circumstances under which the tribe, any person or any entity will engage in Class III gaming. The tribe may unilaterally repeal its ordinance which renders all Class III gaming illegal with a one year period in which to wind up operations.

The IGRA requires that a tribe wishing to engage in Class III gaming must request the state to enter into compact negotiations. Upon receiving the request the state must negotiate "in good faith" with the tribe. The compact must be approved by the Secretary of the Interior. It is permissible, but not mandatory, that the compact may address:

(1) which government's laws and regulations will apply and who will license;
(2) which government will have criminal and civil enforcement jurisdiction;
(3) whether the state will be paid a fee for any agreed upon regulatory or

enforcement activities;

(4) tribal taxation of gaming activities in amounts comparable to state assessments for comparable activities;

(5) standards of operation and licensing;

(6) remedies for breach of the compact and any other matter pertinent to the operation of Class III gaming activities.

The Act also permits the tribe to agree to concurrent regulation with the state of gaming activities. The compact may permit mechanical gaming device gambling otherwise prohibited on reservations under 15 U.S.C. 1175 (the Johnson Act) if the state in which the reservation is located permits such gaming.

II. THE STATUTORY NEGOTIATION PROCESS

Prior to passage of the Indian Gaming Regulatory Act, both states and tribes had the sovereign governmental authority to enter into government-to-government agreements. At the time the Act was passed many states and tribes had tribal-state agreements addressing law enforcement, cigarette tax and gasoline tax, social services, extradition, child support enforcement and other matters. Most tribes have constitutional authority to make such agreements and many states, especially western states, have statutory provisions giving authority to the governor or various administrative branches to negotiate and enter into intergovernmental agreements with Indian tribes.

Pursuant to the Act the tribe initiates the request to compact and the state begins to negotiate with the tribe in good faith. If the state does not respond to the request or the tribe believes the state has not negotiated or responded in "good faith" the tribe may commence an action in Federal District Court only after 180 days have passed from the date the tribe requested negotiations.

If the District Court finds that the state has failed to negotiate in good faith or failed to respond, the Court must order the state and the tribe to conclude a compact within 60 days. If the tribe and the state do not come to agreement within 60 days, each side submits its last best offer to a court appointed mediator who selects either the state or tribal compact under the guidance of the IGRA, other applicable federal law and the findings and

order of the District Court. The mediator then submits his choice to the state and the tribe. There is then another 60 day period during which the state may consent to a proposed compact (presumably the one chosen by the mediator). **If the state does not consent to a proposed compact during this 60 day period the matter goes to the Secretary of Interior.** The Secretary, in consultation with the tribe, "prescribes procedures" consistent with the proposed compact selected by the mediator, consistent with the findings of the District Court, consistent with the IGRA and relevant provisions of state law, under which gaming will be conducted relative to the particular tribe(s) involved. The Secretary has the discretion to disapprove a compact that violates the IGRA, other provisions of federal law or the trust responsibility of the United States to Indians.

The process envisions a negotiation process between the Secretary and the tribe(s) after the mediation process has not resulted in a tribal-state compact. The Secretary's discretion is tempered and guided by the findings of fact and law by the District Court and the findings and decision of the mediator. Because the state is taken out of the process at this point, the Secretary and the tribe must address issues of the division of enforcement responsibilities between the tribe and the federal government, issues of the type of gaming that will be conducted and the limitations that will be placed upon it.

There appears to be no timeline in the Act within which the Secretary must approve the compact reached between he and the tribe. The only timeline mentioned is a 45-day timeline during which he must approve a tribal-state compact entered into between a state and a tribe. If he does not approve a tribal-state agreement within the 45-days, it is considered approved.

II. STATE-TRIBAL COMPACTS CONCLUDED UNDER THE IGRA

Various publications list 145 or more Indian gaming enterprises across the United States in some 25 states. As of the date this paper is being written, seventy-five (75) tribal-state compacts have been approved and published in the Federal Register representing 58 tribes in 18 states. The following is a state by state listing of these compacts and general description of the type of Class III gaming conducted pursuant to the compacts. The games listed may not be played by all tribes listed with a particular state.

ARIZONA(3): **Ak-Chin Indian Community**, Maricopa, AZ; **Cocopah Tribe of Somerton**, AZ; **Yavapai-Prescott Tribe** of Prescott, AZ; **Fort McDowell Mohave-Apache** of Fountain Hills, AZ;

GAMES: Gaming devices, video lottery, lottery off-track pari-mutuel wagering, horse racing, dog racing.

CALIFORNIA (5): **Barona Band of Diegueno Mission Indians**, Lakeside; CA; **Cabazon Band of Cahuilla Mission Indians**, Indio, CA; **San Manuel Band of Serrano Mission Indians**, Highland, CA; **Viejas Group of Diegueno Mission Indians**, Alpine, CA; **Sycuan Band of Diegueno Mission Indians**, El Cajon, CA

GAMES: Para-mutuel wagering on horse racing

COLORADO (2): **Southern Ute Indian Tribe**, Ignacio, CO; **Ute Mountain Ute Tribe**, Towaoc, CO

GAMES: Slot machines, blackjack, racing, off-track betting, keno, lottery, poker

CONNECTICUT (1): **Mashantucket Pequot Tribe**, Ledyard, CT

GAMES: Blackjack, poker, dice, money wheel, roulette, baccarat, chuck-a-luck, pan, over and under, horse race game, acey-ducey, beat the dealer, bouncing ball, lottery, pari-mutuel off-track betting, pari-mutuel jai alai, and video facsimiles of games of chance

IDAHO (1): **Coeur d'Alene Tribe**, Plummer, ID

GAMES: Lottery, pari-mutuel betting on racing/simulcast

IOWA (3): **Omaha Tribe**, Macy, NE; **Sac and Fox Tribe**, Tama, IA; **Winnebago Tribe of Nebraska**, Winnebago, NE;

GAMES: Lottery, keno, pari-mutuel betting/simulcast, video games of chance, slot machines, twenty-one, red dog, roulette, big six, sports pools, craps, poker, sports betting, parlay cards, dice games, wheel games

LOUISIANA (2): **Coushatta Tribe**, Elton, LA; **Tunica-Biloxi**, Mansura, LA;
GAMES: Electronic games of chance, baccarat, mini baccarat, blackjack, roulette, craps, poker, keno

MINNESOTA (11): **Bois Forte Chippewa**, Nett Lake, MN; **Fond Du Lac Chippewa**, Cloquet, MN; **Grand Portage Chippewa**, Grand Portage, MN; **Leech Lake Chippewa**, Cass Lake, MN; **Lower Sioux**, Morton, MN; **Mille Lac Chippewa**, Onamia, MN; **Prairie Island Mdewakanton Sioux**, Welch, MN; **Red Lake Chippewa**, Red Lake, MN; **Shakopee Mdewakanton Sioux**, Prior Lake, MN; **Upper Sioux**, Granite Falls, MN; **White Earth Chippewa**, White Earth, MN
GAMES: Video games of chance, blackjack

MISSISSIPPI (1): **Mississippi Band of Choctaw**, Philadelphia, MS
GAMES: Craps, roulette, blackjack, poker, baccarat, chemin de fer, slot machines

MONTANA (1): **Assiniboine and Sioux Tribes (Fort Peck)**, Poplar, MT
GAMES: Video keno, video poker, video bingo, simulcast racing, lottery, live keno
Note: **Northern Cheyenne, Crow** and **Rocky Boy's** compacts are pending Secretarial approval

NEBRASKA (1): **Omaha Tribe of Nebraska**, Macy, NE
GAMES: Keno, lottery, big six, big nine, wheel games, roulette, chuck-a-luc

NEVADA (1): **Fort Mojave Tribe**, Needles, CA
GAMES: Casino gambling

NORTH DAKOTA (4): **Devil's Lake Sioux**, Fort Totten, ND; **Sisseton-Wahpeton Sioux**, Sisseton, SD; **Standing Rock Sioux**, Fort Yates, ND; **Three Affiliated Tribes (Fort Berthold)** ND; **Turtle Mountain Chippewa**, Belcourt, ND

GAMES: Video lottery, slot machines, blackjack, poker, keno, punchboards, paddlewheels, craps and Indian dice, sports pools, calcutta pools, pari-mutuel and simulcast, raffles

OKLAHOMA (1): **Citizen Band Potawatomi**; Shawnee, OK
GAMES: Video lottery terminals

OREGON (1): **Cow Creek Band of Umpqua**, Roseburg, OR
GAMES: Video lottery, keno

SOUTH DAKOTA (6): **Crow Creek Sioux**, Fort Thompson, SD; **Flandreau Santee Sioux**, Flandreau, SD; **Lower Brule Sioux**, Lower Brule, SD; **Sisseton-Wahpeton Sioux**, Sisseton, SD; **Standing Rock Sioux**, Fort Yates, ND; **Yankton Sioux**, Marty, SD; **Rosebud Sioux**, Rosebud, SD
GAMES: Blackjack, poker, slot machines, video lottery

WASHINGTON (6): **Confederated Tribes Chehalis Reservation**, Oakville, WA; **Lower Elwha Klallem**, Port Angeles, WA; **Nooksack Tribe**, Deming, WA; **Swinomish Tribe**, La Conner, WA; **Tulalip Tribes**, Marysville, WA; **Upper Skagit Tribes**, Sedro Woolley, WA
GAMES: Blackjack, money wheels, roulette, baccarat, chuck-a-luck, pai-gow, chemin de fer, craps, 4-5-6, horses, ship-captain-crew, beat the dealer, over-under seven, beat my shake, horserace, sweet sixteen, sports pools, sic-bo, caribbean stud poker, lottery, keno, instant tickets, punch boards and pull tabs, table and other table games (Tulalip and Nooksack games authorized in Nevada authorized by state (Swinomish)

WISCONSIN (11): **Bad River Chippewa**, Odanah, WI; **Forest County Potawatomi**, Crandon, WI; **Lac Courte Oreilles Chippewa**, Hayward, WI; **Lac Du Flambeau Chippewa**, Lac Du Flambeau, WI; **Menominee Tribe**,

Keshena, WI; **Oneida Tribe**, Oneida, WI; **Red Cliff Chippewa**, Bayfield, WI; **St. Croix Chippewa**, Hertel, WI; **Sokoagan Chippewa**, Crandon, WI; **Stockbridge-Munsee (Mohican)**, Bowler, WI; **Wisconsin Winnebago**, Black River Falls, WI

GAMES: Electronic games of chance, blackjack, pulltabs

III. COMPACT LITIGATION

There has been IGRA related litigation in at least twenty (20) states and the District of Columbia (Alabama, Arizona, California, Connecticut, District of Columbia, Florida, Kansas, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Washington and Wisconsin). Eleven states (Alabama, Florida, Michigan, Mississippi, Montana, New Mexico, New York, North Dakota, Oklahoma, South Dakota and Washington) have raised state sovereign immunity defenses according to the Eleventh Amendment of the United States Constitution and the defense of "reserved powers" under the Tenth Amendment. Most of these cases were filed by tribes after the state refused to enter into negotiations in response to an official tribal request under the "good faith" negotiation provisions in the Act or pursuant to the IGRA provisions allowing tribes to negotiate Class III games that are being conducted within the state for "any purpose by any person, organization or entity." Some of the cases involved not just the issue of the types of Class III gaming allowed under a compact but also the limitations (number of games, prizes, wagers, locations, etc.) that the state was attempting to place on tribal gaming. Some cases involved the exclusivity of federal enforcement authority to enforce the IGRA absent a compact giving such authority to a state. (See Also: **"A Summary of the Caselaw Interpreting the Indian Gaming Regulatory Act"**, National Indian Policy Center, by Doug Endreson, Esq., **"Good Faith Under the Indian Gaming Regulatory Act"** by the Office of Attorney General, Cheyenne River Sioux Tribes, **"A Refutation of the Conference of Western Attorneys' General Report to Congress of March 17, 1993"** by Jerry Straus, Esq. and Judith Shipiro, Esq., **"States Wrongly Assert that IGRA Violates the Tenth and Eleventh Amendments To Avoid Dealing With Tribes"** by Scott Crowell and Jerry Straus).

IV. CONCLUSION

The IGRA has worked successfully in those states in which a true negotiation process has taken place as envisioned by the Congress. In those states where litigation has taken place there has either been a refusal by the state to negotiate at all, refusal to negotiate gaming that is permitted under a state's permissive/regulatory gaming laws, an attempt by the state to place arbitrary limitations on Indian gaming that negates any meaningful economic benefit to tribes or the state's attempt to make all tribes in a state agree to exactly the same compact. The irony of the state's reliance upon the Tenth and Eleventh Amendment to defeat the intent of the compacting provisions of the Act is that Congress inserted the compacting provisions into the Act to give the states a right they never previously had, the right to inject state interest into the right of tribes to govern without the interference of the state.

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A SUMMARY OF THE CASELAW INTERPRETING THE INDIAN GAMING REGULATORY ACT

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INTRODUCTION

Congress enacted the Indian Gaming Regulatory Act in 1988. As Representative Udall, the chief House sponsor of the Gaming Act, said during the floor consideration of the bill, the Act was "the culmination of nearly 6 years of congressional consideration of this issue." *Cong. Rec.* H8153 (daily ed. Sept. 26, 1988).

The IGRA divides gaming into three categories. Class I gaming consists of traditional forms of Indian gaming such as "social games solely for prizes of minimal value," 25 U.S.C. § 2703(6), and is left essentially unregulated by the Act. 25 U.S.C. § 2710(a)(1). Class II gaming, the most common form of Indian gaming, includes bingo and related forms of gaming such as pull-tabs, punch boards, lotto, tip jars, instant bingo and "other games similar to bingo." 25 U.S.C. § 2703(7)(A). Class III gaming is all other gaming, including casino games, non-grandfathered banking card games, video games, parimutuel betting and so forth. 25 U.S.C. § 2703(8). Class III gaming must be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State...that is in effect." *Id.* at § 2710(d)(1)(C).

The IGRA has been the subject of litigation on a wide range of issues since its enactment. The greatest concentration of these cases concern the states' obligation to conduct tribal-state compact negotiations in good faith. A number of states have resisted judicial enforcement of this obligation, resting their position on the Eleventh Amendment. These and other recent cases of significance are discussed below.

I. CONSTITUTIONALITY OF IGRA

The constitutionality of IGRA was sustained in Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9 (D.D.C. 1990), affirmed in an unpublished opinion, Red Lake Band of Chippewa Indians v. Brown, 1991 U.S. App. Lexis 4712 (D.C.Cir. 1991). Two tribes, the Red Lake Band of Chippewa Indians and the Mescalero Apache Tribe, sued to enjoin the Department of Interior from implementing IGRA. The district court held that the legislative history revealed Congress had considered the advantages and disadvantages of gaming on Indian lands, and thus that the enactment of IGRA was within its plenary power and was reasonably related to its trust responsibility.

II. TENTH AND ELEVENTH AMENDMENT CHALLENGES

Several district courts have held that the Eleventh Amendment does not immunize the State from judicial review of whether the State has negotiated in good faith. Cheyenne River Sioux Tribe v. South Dakota, Civ. 92-3009 (S.D.S.D. 1993); Seminole Tribe of Florida v. Florida, 801 F. Supp. 655 (S.D. Fla. 1992); (very recent Kansas case).

The Court in Seminole, after first finding that the text of 25 U.S.C. § 2710(d)(7)(A)(i) indicates clear congressional intent to abrogate state sovereign immunity, identified the issue as whether Congress had the power to do so. The Court held that Congress' plenary power in the area of Indians relations provides a substantial basis for finding Congressional power to abrogate state sovereign immunty. Just as Congress has the power to abrogate state sovereign immunity when acting pursuant to the Interstate Commerce Clause, Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), Congress has the same power when acting pursuant to the Indian Commerce Clause.

In Cheyenne River, the Court also held that IGRA does not violate the Tenth Amendment because it does not "force" states to negotiate a compact, but instead provides the State with a choice on whether to have "input" on how Indian gaming will be regulated. Accord Yavapai-Prescott Indian Tribe v. Arizona, 796 F. Supp. 1292 (D. Ariz. 1992).

Other district courts have granted motions to dismiss suits against states under IGRA on Eleventh Amendment grounds. Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484 (S.D. Mich. 1992); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550 (S.D. Ala. 1991); Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057 (E.D. Wash. 1991).

Sault Ste. Marie is typical of the reasoning of these cases. There, the Court rejected the "plan of convention" argument, that the State had implicitly waived its immunity by joining the Union. Relying on Blatchford v. Noatak, 501 U.S.___, 115 L.Ed.2d 686 (1991), the Court held that there was no "mutuality" of waiver between states and tribes in the formation of the Union, and thus no implied surrender of immunity by the State. Turning to IGRA, the Court first interpreted 25 U.S.C. § 2710(d)(7)(A)(i) to be a clear expression of congressional intent to waive the states' sovereign immunity. However, relying on Pennsylvania v. Union Gas Co., 491 U.S. 1, 5 (1989), and Blatchford, the Court held that

Congress does not have the power to abrogate state sovereign immunity when legislating pursuant to the Indian Commerce Clause, as it did in enacting IGRA.

Similarly, in Poarch Band, while finding an "unmistakably clear" statement of congressional intent to waive sovereign immunity in 25 U.S.C. § 2710(d)(7)(A)(i), the Court held the waiver ineffective on the ground that the Indian Commerce Clause did not provide Congress with the power to abrogate state sovereign immunity. The Court stated that it was not bound by Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), on this issue because the decision, a plurality opinion, was not "directly on point" and rested on "shaky ground." Thus, the Court declined to rely on Union Gas, which held that Congress' power to regulate commerce under the Interstate Commerce Clause includes the power to abrogate state sovereign immunity, to hold that Congress has the same power when legislating under the Indian Commerce Clause.

In Sault Ste. Marie, the Court also rejected plaintiffs' alternative argument that if the Eleventh Amendment immunizes the State from IGRA suits (as the Court held it did), the Court should declare IGRA unconstitutional. (Plaintiffs had asserted that such a holding rendered the severability clause insufficient to save the statute.) Recognizing that plaintiffs intended to amend the complaint to name State officials, the Court determined that this issue was premature because the amendment would require a determination of whether the suit could proceed under the theory of Ex parte Young, 209 U.S. 123 (1908).

Poarch Band held that the doctrine of Ex parte Young did not operate to waive the Eleventh Amendment in the suit against the State, but noted that it may apply to the Tribe's claim against the Governor. In Spokane Tribe, the Court, although holding that the Eleventh Amendment barred direct suit against the State, applied the doctrine of Ex parte Young to deny the individually named defendants' motions to dismiss. While expressing concern over the potentially "unwarranted judicial interference" with the exercise of executive discretion that an award of injunctive relief might cause, the Court concluded that this concern was "outweighed" by the possibility that dismissal would deprive the Tribe of a forum in which to present its IGRA claims.

All these cases are district court decisions. Appeals are pending in the Sixth, Ninth and Eleventh Circuits.

III. THE STATE'S OBLIGATION TO NEGOTIATE IN GOOD FAITH

The IGRA provides that a tribe which wishes to conduct Class III gaming must formally request the State to enter negotiations for a compact. 25 U.S.C. § 2710(d)(3)(A). The exact terms and conditions of any particular compact are for the tribe and state to negotiate as they see fit. The Act suggests topics for the negotiation, but leaves it to the parties to strike the deal that best serves their mutual interests. No particular outcome is predetermined by the Act. As the Senate Report notes, "The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and state, etc....A compact may allocate most or all of the jurisdictional responsibility to the tribe, to the state or to any variation in between." S.Rep. 100-446, supra at 14.

Congress also constructed an elaborate and important federal judicial mechanism for tribes to vindicate their right to a good faith negotiation. If a state fails to negotiate with a tribe at all, or fails to do so in good faith, the tribe may bring an action in federal district court. 25 U.S.C. § 2710(d)(7)(A)(i). Congress placed the burden of proof on the state to justify its negotiating position, and "to prove that the State has negotiated with the Indian tribe in good faith." Id. at § 2710(d)(7)(B)(ii). Only if a state fails to meet its burden of proving that it has negotiated in good faith with the tribe can the district court order it to conclude a compact within a 60 day period. Id. at § 2710(d)(7)(B)(iii). If the tribe and state fail to agree to a compact within that time, the court appoints a mediator who considers "the last best offer" for a compact from both the tribe and the state, and chooses one. *Id.* at § 2710(d)(7)(B)(iv). The state has the opportunity to accept the mediator's selection, *id.* at § 2710(d)(7)(B)(v), or failing that, the mediator notifies the Secretary of the Interior, who then prescribes federal regulations, consistent with the mediator's decision, for the conduct of Class III gaming on the tribe's reservation. Id. at § 2710(d)(7)(B)(vii).

Several cases have granted tribes relief pursuant to 25 U.S.C. § 2710(d)(7). In Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990), the State had simply refused to enter into any compact negotiations. The State argued that a tribe must first adopt a Class III ordinance. The Second Circuit ordered Connecticut to enter into good faith negotiations with the Tribe and to conclude a tribal-state compact within sixty days, observing that the "only condition precedent to negotiation specified by the IGRA is a request by a tribe that a state enter into negotiations." The Court also found that the

State of Connecticut permitted highly regulated forms of casino games, and that such gaming was thus not contrary to the State's public policy. The State therefore was required to negotiate a compact for this Class III gaming. Ultimately, a mediator was appointed and the Court ordered implementation of the compact the mediator selected.

In Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 770 F. Supp. 480 (W.D. Wisconsin 1991),[1/] several tribes brought suit under 25 U.S.C. § 2710(d)(7) alleging that the State had failed to negotiate in good faith about certain games. The State conceded its refusal to negotiate, but contended that certain activities, such as slot machines, casino games and video games were not "proper subjects of negotiation" because state law did not allow these games. Two amendments to the state constitution legalized lotteries and parimutuel on-track betting. The Court interpreted § 2710(d)(1)(B), which provides that Indians may engage in Class III gaming as long as "such activities are . . . located in a State that permits such gaming . . ." to mean that since the State allowed certain Class III games, the tribes could negotiate about all Class III games. The Court found that the state constitution expressed a permissive regulatory policy toward gaming, and that the State did not prohibit the forms of Class III gaming which the tribes sought to conduct.

In Cheyenne River Sioux Tribe v. South Dakota, Civ. 92-3009 (S.D.S.D. 1993), the court held that the record would not support a finding that the State's refusal to agree to the Tribe's bet limits constituted bad faith. The Court also found the record insufficient to determine whether the State had failed to negotiate in good faith concerning two off-Reservation locations, which the Tribe asserted were "Indian lands" as that term is defined by the Commission's regulations. On the Tribe's claim that the State was required to negotiate concerning both video keno and stand alone keno, the Court, differing with Lac du Flambeau, held that under the "such gaming" language of 25 U.S.C. § 2710(d)(1)(B), the Tribe could conduct video keno, but not stand alone keno, since the State itself offered only the former.

In Rhode Island v. Narragansett Tribe of Indians, 1993 U.S. Dist. Lexis 2783 (D.R.I. 1993), the Court held that IGRA applied to the lands of the Narragansett Tribe and ordered compact negotiations. Although the Rhode Island Indian Claims Settlement Act provided

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1/ Appeal was taken of this decision, but the appeal was dismissed for failure to file a timely notice of appeal. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 957 F.2d 515 (7th Cir. 1992).

that the Tribe's lands were "subject to state civil and criminal laws and the exercise of state civil and criminal jurisdiction," the Court held that IGRA preempted the jurisdictional grant provided to the State under the Settlement Act, and under IGRA, the exercise of state jurisdiction over Class III gaming on Indians lands should be addressed through the negotiation process. The Court rejected references in IGRA's legislative history which indicated that Congress did not intend IGRA to preempt the jurisdictional grant in the Rhode Island Indian Claims Settlement Act. The Court also concluded that the specific language of IGRA prevails over the general language in the Rhode Island Settlement Act. Finally, the Court held that the Tribe did "exercise governmental powers" under 25 U.S.C. § 2703(4) (defining Indian lands) or have "jurisdiction" under 25 U.S.C. § 2710(d)(3)(A)(pre-condition to Class III gaming) over the lands, since the federal government had recognized the Tribe and the First Circuit had recognized its sovereign immunity from suit.

IV. WHETHER A GAME IS CLASS II OR CLASS III

In Spokane Indian Tribe v. United States, 972 F.2d 1090 (9th Cir. 1992), the Ninth Circuit held that the Tribe's Pick Six game, "an electronic facsimile in which a single participant plays against the machine," was not Class II gaming. The Ninth Circuit noted that 25 U.S.C. § 2703(B)(1) explicitly excludes "electronic or electromechanical facsimiles of any game of chance. . . ." The Court also rejected the Tribe's argument that the term "lotto" as used in 25 U.S.C. § 2703(7)(A) is synonymous with "lottery," and that therefore the Tribe's Pick Six game should properly be classified as Class II gaming. The Court found that while the statute left the term "lotto" ambiguous, the legislative history clarified that ambiguity. The Court concluded that Congress adopted the amendment which included the term "lotto" in the definition of Class II game for the purpose of distinguishing "lotto" from "lotteries," and Congress thus clearly intended lotteries to be Class III gaming.

In Oneida Tribe of Indians v. Wisconsin, 951 F.2d 757 (7th Cir. 1991), the Seventh Circuit held that "lotto" is Class III gaming. It relied on the common dictionary meaning of "lotto" as meaning "a game of chance, played in a bingo-like setting on a bingo-like card, following bingo-like procedures ... not [a] ... lottery in general or the type of lottery operated by various states denominated 'Lotto' or some derivative thereof." Thus, the Court held that the Tribe must conclude a tribal-state compact prior to continuing the operation of the lottery type activities it proposed.

In Shakopee Mdewakanton Sioux Community v. Hope and Lower Sioux Indian Community v. Nat'l Indian Gaming Comm'n., Civil Nos. 4-92-343 and 4-92-482 (D.Minn. July 27, 1992), the Court upheld a regulation promulgated by the National Indian Gaming Commission (NIGC), 25 C.F.R. § 502.4, which classified keno as Class III, rather than Class II, gaming. First, the Court held that the regulation constituted a legislative rule with the force and effect of law, not a nonbinding interpretative agency rule. Applying the two-part test established in Chevron, U.S.A. v. Natural Resources Defense Fund, 467 U.S. 837 (1984), the Court determined that (1) neither IGRA nor its legislative history shed light on the definition of keno; and (2) the NIGC permissibly construed IGRA in adopting the house banking concept as the test for determining whether a particular game was "similar to bingo" under 25 U.S.C. § 2703(7).

The Court also held that the legislative history clearly indicated that Congress distinguished bingo from high-stakes casino gambling and "placed card games in which the players play against each other in Class II, 25 U.S.C. § 2703(7), while placing card games in which the players play against the house in Class III." Finding the Agency's construction permissible, the Court deferred to it.

In Sisseton-Wahpeton Sioux Tribe v. United States, 1992 U.S. Dist. Lexis 15356 (N.D.S.D. 1992), the Tribe sought a judgment declaring that pick bingo and keno fell within Class II gaming under IGRA. The Court initially stayed the action until the National Indian Gaming Regulatory Commission (NIGC) promulgated its rules further defining Class II and Class III gaming. The regulations categorized keno as Class III gaming, but did not address pick bingo. Dismissing the pick bingo claim for lack of ripeness, the Court held that the Tribe should seek administrative review from the NIGC in accordance with the regulations.

On the keno claim -- which the Court held was ripe -- the Court applied the test for reviewing agency rules enunciated in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), and sustained the NIGC's rule that keno is Class III gaming. It determined that congressional intent as to the meaning of "games similar to bingo" was ambiguous, that NIGC had interpreted IGRA in promulgating regulations further defining Class II and Class III gaming and "games similar to bingo," and that Congress had impliedly delegated to the NIGC the authority to interpret IGRA in 25 U.S.C. § 2706(b), 2710(b)-(e), 2711-2713 and 2715-2716. The Court further determined that by using the house banking concept as the test for distinguishing between Class II and Class III gaming,

NIGC aimed to accommodate the competing purposes of IGRA, i.e. the promotion of tribal economic development and protection of Indian gaming from the "infiltration of organized crime" and corruption. The Court finally held that its approval of NIGC's statutory construction was consistent with the principle that ambiguities should be construed in favor of Indians because that construction promoted the purpose of protecting Indian gaming from organized crime and corruption.

V. GRANDFATHERED GAMES

In United States v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358 (8th Cir. 1990), the Eighth Circuit determined that the Tribe's blackjack games had been grandfathered by Section 2703(7)(c) of IGRA which provides that:

> [n]otwithstanding any other provision in this paragraph, the term "class II gaming" includes those card games played in . . . . . South Dakota . . . that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date . . .

25 U.S.C. § 2703(7)(C).

The Sisseton-Wahpeton Tribe had conducted blackjack games prior to May 1, 1988. After IGRA became effective, the Tribe had increased the hours of operation and the number of tables at its gaming operation, but had not changed the pot and wager limits, which had remained the same since IGRA was enacted. In holding that these games had been grandfathered, the Court reasoned that a change in the "nature and scope" of a game did not include increasing the number of tables or hours of operation, but, rather that as stated in the Senate Report, that phrase referred to a "change in . . . character, i.e., new or different kinds of games may not be substituted for the games that are grandfathered and the games must be played with the same pot and wager limits as currently operated."

The Eighth Circuit also reversed the district court's conclusion that even if the Tribe's blackjack operation fell within the grandfather clause, it was unlawful under 25 U.S.C. § 2710(b)(1)(A) ("located within a state that permits such gaming") because the Tribe violated state law proscribing wager and pot limits. The Court held that § 2710(b)(1)(A) permits tribes to conduct Class II gaming, "even if conducted in a manner inconsistent with state law if the state law merely regulated, as opposed to completely barred, that particular gaming activity," as long as state law permits some form of Class II gaming.

VI. WHO BINDS A STATE

In Kansas ex rel. Stephan v. Finney, 251 Kan. 559, 836 P.2d. 1169 (1992), the State Attorney General challenged the authority of the Governor to bind the State to a tribal-state compact negotiated pursuant to IGRA. The Court determined that IGRA did not preempt state statutory law which reposed the consent to the terms of the compact in the state legislature. The Court held that under Kansas law, the Governor may enter negotiations with tribes, but that the legislature must approve any compact.

VII. CONSTRUCTION WITH OTHER LAWS

A. Other Federal Statutes

In United Keetoowah Band of Cherokee Indians v. Oklahoma, 927 F.2d 1170 (10th Cir. 1991), the Tenth Circuit held that IGRA, specifically 18 U.S.C. § 1166, preempted the Assimilative Crimes Act (ACA) and "bars federal courts from enjoining Indian bingo by application of state law through the ACA." The Tenth Circuit stated that the comprehensiveness of the IGRA statutory scheme, including its civil and criminal penalty provisions, demonstrates congressional intent to "occup[y] the regulatory field on Indian gaming."

However, in United States v. Cook, 922 F.2d 1026 (2d Cir. 1991), the Second Circuit rejected the argument that IGRA and 18 U.S.C. § 1166 preempted 18 U.S.C. § 1955, which bars a gambling business contrary to state law, and 18 U.S.C. § 1175, which prohibits illegal slot machines. The Second Circuit cast the issue as one of implicit repeal, not preemption. The Second Circuit concluded that although § 1166 and § 1955 both punish violations of state law, the scope of § 1955 "exceeds that of section 1166" by targeting large-scale illegal gambling operations and stated that "the provisions do not demonstrate the mutual exclusivity necessary to impute to Congress the clear, affirmative intent to repeal." It also held that IGRA did not repeal § 1175. At the time of defendants' convictions, the Tribe and State had entered negotiations for a compact covering slot machines, but had not concluded one. The Court affirmed the convictions because § 2710(d)(6) of IGRA "expressly provides for the continuing application of 15 U.S.C. § 1175, except where gaming is conducted in accordance with a tribal-state compact that is in effect."

Finally, the Court rejected defendants' argument that their operation of slot machines entitled them to the grace period provided in the grandfather clause, § 2703(7)(D), of IGRA. In the absence of a tribal-state compact permitting such activity, the Court concluded that the defendants were not entitled to the grace period.

B. State Laws

While Cook allowed state gambling laws to be enforced by United States attorneys in federal court, the courts have uniformly held that IGRA bars states from

themselves enforcing state laws against tribal gaming. In Seneca-Cayuga Tribe of Oklahoma v. Oklahoma, 874 F.2d 709 (10th Cir. 1989), the State filed a suit for injunctive relief in state court to enjoin the Tribe from operating bingo games in violation of state law. The Tribe then filed suit in federal district court and obtained an injunction against the State, prohibiting the State from enforcing state law against the Tribe. Applying Younger v. Harris, 401 U.S. 37 (1971), the Tenth Circuit held that because the central issue in the case, the operation of gaming on Indian lands, clearly "implicated" a significant federal interest, the federal court was the proper forum for resolution of the issue, and the state laws could not be enforced. The Court noted that the enactment of IGRA "undermined" the State's interest in preventing organized crime. The State's interest in adjudicating the dispute was further diminished by the fact that the state courts lack jurisdiction by virtue of the Tribes' immunity from suit.

In Sycuan Band of Mission Indians v. Roache, 788 F. Supp. 1498 (S.D. Cal. 1992), the Court held that IGRA preempted the State from executing search warrants and criminally prosecuting individuals for conducting activities on the reservation -- in the absence of a tribal-state compact providing for state regulation of Class III gaming. Despite pending state prosecutions, the Court determined that the Anti-Injunction Act, 28 U.S.C. § 2283, did not apply because in enacting IGRA, Congress granted the federal court exclusive jurisdiction over prosecution of state gaming laws on Indian reservations, and the injunction was "necessary in aid of [the court's] jurisdiction."

Lac du Flambeau Band of Lake Superior v. Wisconsin, 743 F. Supp. 645 (W.D. Wis. 1990), also held that states may not criminally prosecute violations of the IGRA.

In Inland Casino Corp. v. Superior Court of San Diego County, 8 Cal. App. 4th 770, 10 Cal. Rptr. 2d 497, 1992 Cal. App. Lexis 968 (Cal. Ct. App. 1992), the Court held that a state court does not have jurisdiction over an action to foreclose on a mechanic's lien against property used in tribal gaming located on "Indian lands" pursuant to IGRA because foreclosure may "potentially affect tribal interests."

VIII. MANAGEMENT CONTRACTS

Several cases hold that contracts by non-Indians to manage tribal gaming are void unless approved by the BIA or the National Indian Gaming Commission. 25 U.S.C. § 2711. See also 25 U.S.C. § 81. Rita, Inc. v. Flandreau Santee Sioux Tribe, 798 F. Supp. 586 (D.S.D. 1992); Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 1992 U.S. Dist. Lexis 13522 (S.D. Fla. 1992); Potawatomi Indian Tribe v. Enterprise Mgt. Consul., 734 F. Supp. 455 (W.D. Okl. 1990).

These cases reject "equities" asserted by management companies. In Flandreau, a newly elected tribal council had determined that it did not wish to take further action on having the agreement approved. In Tamiami, the Tribe declined to license a management contractor's employees, and the Court determined that the management contract was void

even though the tribal licensing process was "arbitrary and capricious" under the guidelines of the Administrative Procedure Act. The Court reasoned that IGRA did not authorize federal courts to declare tribal licensing processes unlawful, and found that tribal sovereign immunity barred injunctive relief against the Tribe. Although the Tribe, acting as a party to the management contract, had consented to the suit to enforce the contract, this waiver was narrowly construed by the Court to be limited to actions relating to the agreement.

In Fond du Lac Band of Lake Superior Chippewa v. City of Duluth, Civil File No. 5-89-0163 (D.Minn. 1990), the Court declined to review the lawfulness under IGRA of a series of agreements between the Tribe and City of Duluth for the "creation of a joint venture to operate a gaming casino." The Court held that a declaratory judgment was "inappropriate" because 25 U.S.C. § 2712 provided that "all collateral agreement adopted prior to October 17, 1988 are valid unless disapproved under § 2712," and ruled that the agreement should first be submitted to the Chairman of the NIGC.

IX. TAXES AND LICENSE FEES

In Cabazon Band of Mission Indians v. California, 788 F. Supp. 1513 (E.D. Cal. 1992), the Court held that IGRA did not preempt the imposition of state license fees on racing associations which simulcast to the tribal off-track betting facilities. The Court concluded that IGRA specifically addressed direct taxation, but not indirect taxation, of Indian tribes.

X. PER CAPITA DISTRIBUTION

In Ross v. Flandreau Santee Sioux Tribe, 809 F. Supp. 738 (S.D.S.D. 1992), the Court held that a tribe could not make per capita payments from gaming revenues to tribal members residing within the "de facto" boundaries of the tribal territory, but exclude tribal members residing outside the "de facto" boundaries. The Tribe had submitted proposals for a distribution plan for the approval of the Secretary of Interior, but the Secretary had not approved the plan. The Court therefore held any distributions of gaming revenues by the Tribe violates IGRA. The Court ordered the Tribe to deposit all future revenues with the Clerk of Court and held that distribution would occur only after the Secretary of Interior has approved a per capita payment plan.

The Court in Flandreau also held that by engaging in Class II and Class III gaming under IGRA, the Tribe had waived its sovereign immunity from suits determining its compliance with IGRA. The Court concluded that sovereign immunity does, however, bar claims for monetary damages against the Tribe for its failure to properly distribute the gaming revenues.

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